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In the Supreme Court of the United States

OCTOBER TERM, 1978

PATRICIA R. HARRIS, SECRETARY OF HOUSING AND URBAN DEVELOPMENT, PETITIONER

v.

ROLAND N. KARLEN, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General, on behalf of Patricia R. Harris, the Secretary of Housing and Urban Development, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The decision of the court of appeals (App. A, *infra*, 1a–11a) is reported at 590 F.2d 39. The decision of the district court (App. B, *infra*, 12a–48a) is reported at 445 F. Supp. 204. The earlier opinion of the court of appeals (App. C, *infra*, 49a–62a) is reported at 523 F.2d 88. The earlier opinion of the district court (App. D, *infra*, 63a–141a) is reported at 387 F. Supp. 1044.

JURISDICTION

The judgment of the court of appeals (App. E, *infra*, 142a–143a) was entered on December 14, 1978, and a petition for rehearing was denied on March 15, 1979 (App. F, *infra*, 144a–145a). On June 5, 1979, Mr. Justice Marshall extended the time for filing a petition for a writ of certiorari to and including July 13, 1979, and on July 5, 1979, Mr. Justice Marshall further extended the time for filing a petition to and including August 3, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

When a federal agency has given detailed consideration to environmental values in its decisionmaking process, in full compliance with the procedural requirements of the National Environmental Policy Act, does NEPA authorize a court to reweigh the relevant considerations and to require the agency to choose an alternative that the court regards as environmentally preferable but that the agency has rejected for policy reasons.

STATUTORY PROVISION INVOLVED

Section 102(2)(E) of the National Environmental Policy Act, 42 U.S.C. 4332(2)(E), provides:

> The Congress authorizes and directs that, to the fullest extent possible: * * * (2) all agencies of the Federal Government shall—
>
> * * * * *
>
> (E) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources * * *

STATEMENT

1. The United States Housing Act of 1937, 42 U.S.C. 1437–1437j, establishes a national policy of assisting

local governments "to remedy * * * the acute shortage of decent, safe, and sanitary dwellings for families of low income * * *" (42 U.S.C. 1437). To achieve this goal the Secretary of Housing and Urban Development is empowered to provide various types of financial assistance to low-income housing projects (42 U.S.C. 1437b-1437f). One of these programs, Section 1437c(a), authorizes the Secretary to "make annual contributions to public housing agencies" not to exceed "the annual amount of principal and interest payable on obligations issued by the public housing agency to finance the development or acquisition cost of the low-income project * * *." By contributing to the debt service and thereby reducing the rent required to be paid by occupants, these annual contributions "assist in achieving and maintaining the low-income character" of such projects (42 U.S.C. 1437c(a)).[1]

2. In 1958, after a two-year study, the New York City Planning Commission decided to devise and implement a comprehensive plan for a 20-block area in Manhattan known as the West Side Urban Renewal Area (WSURA).[2] After holding a number of public hearings, the Commission in 1962 adopted a plan which

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[1] "Low-income families" are those "who cannot afford to pay enough to cause private enterprise in their locality or metropolitan area to build an adequate supply of decent, safe, and sanitary dwellings for their use" (42 U.S.C. 1437a(2)). "Low-income housing" means "decent, safe, and sanitary dwellings within the financial reach of families of low income" (42 U.S.C. 1437a(1)). The rental for federally assisted units for such families may not exceed one-fourth of the family's "income" as defined by the Secretary (42 U.S.C. 1437a(1)). At least 20% of the dwelling units in any project under an annual contributions contract must be occupied by "very low-income families" (*ibid.*). These are "families whose incomes do not exceed 50 per centum of the median family income for the area, as determined by the Secretary with adjustments for smaller and larger families" (42 U.S.C. 1437a(2)).

[2] This area extends from West 87th Street to West 97th Street and from Central Park West to Amsterdam Avenue (App. B, *infra*, 13a n.3).

contemplated that various sites throughout the WSURA would be improved over a period of several years by private parties and local and state agencies (App. D, *infra*, 71a-72a). The plan went into effect in January 1963 (*id.* at 75a).

The WSURA plan called for the eventual provision of 2,500 units of low-income housing through a combination of public housing projects and setting aside 20 to 30% of the units in certain middle-income projects for low-income residents (App. D, *infra*, 73a–75a). By 1969, a total of 1,584 low-rent units had been completed (*id.* at 81a). Shortly thereafter, however, local agencies in New York concluded that because of changed circumstances the original commitment to provide adequate low-income housing in the area was not going to be met and that the only means of achieving that goal would be to convert an area known as Site 30, which had been intended for a middle-income housing project, to a public housing project (*id.* at 83a).[3] On August 11, 1971, the City Planning Commission approved the use of Site 30 for 160 units of public housing, and on November 11, 1971, the city's Board of Estimate agreed (*ibid.*). Subsequently, in December 1972, the Secretary entered into a contract providing loan and annual contributions assistance for the Site 30 project.

3. On October 4, 1971, Trinity Episcopal School Corporation, which had built a combination school and middle-income housing project on Site 24 as part of the WSURA plan (App. D, *infra*, 64a, 76a, 89a), brought suit in the United States District Court for the Southern District of New York to enjoin the construction of public housing on Site 30. Respondents Roland N. Karlen and Alvin C. Hudgins, who had renovated brownstones in the urban renewal area, and the Com-

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[3] Site 30 is located on the west side of Columbus Avenue, between West 90th and West 91st Streets (App. B, *infra*, 13a n.3).

mittee of Neighbors To Insure a Normal Urban Environment (CONTINUE) intervened as plaintiffs (*id.* at 76a). The defendants included the Secretary and the City of New York (*id.* at 64a n.2)[4]

Plaintiffs' contentions stemmed chiefly from the fact that Site 30 was near approximately one-half of the existing public housing in the WSURA and that, as a result of the new project, West 91st Street from Amsterdam Avenue to Central Park West would border buildings containing 837 of the 1,231 public housing units in the area (J.A. 56).[5] In light of this, plaintiffs alleged that the conversion of Site 30 from middle-income to public housing violated their contracts with the city, that the use of Site 30 for public housing violated certain procedural requirements of state and federal housing statutes, and that the Site 30 project, together with other public housing projects in the area, would "tip" the racial balance of the neighborhood in violation of federal law (App. D, *infra*, 65a-66a). The district court rejected each of these contentions in a thorough opinion (*id.* at 89a–120a).[6]

By the time of trial, plaintiffs also contended that, in entering into an annual contributions contract with the public housing agency for Site 30, the Secretary violated the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.*, by preparing only a "special environmental clearance" (Gov't Exh. E) rather than an environmental impact statement (EIS).[7] The Secretary had concluded that the new project was not a "major federal action" and would not have a "significant adverse effect on the environment" and therefore that an EIS was not required (App. D, *infra*, 129a). Plaintiffs argued that the Secretary failed to consider whether the project would have a significant adverse impact on social attitudes and fears of residents caused by the influx of low-income families (*id.* at 130a). The district court rejected this argument, holding that NEPA did not require consideration of such factors (*id.* at 128a–131a). In addition, plaintiffs claimed that the Secretary violated NEPA by not considering alternatives to the proposed use of Site 30 for public housing. The court rejected this argument on the ground that consideration of alternatives is only required in an EIS (*id.* at 134a).

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[4] Strycker's Bay Neighborhood Council, Inc., a public interest group of residents and community organizations, intervened as a defendant (App. D, *infra*, 64a n.2).

[5] "J.A." refers to the joint appendix in the court of appeals.

[6] After a detailed analysis of the community involved, the district court found that 160 units of public housing at Site 30 would not result in racial "tipping" of the neighborhood (App. D, *infra*, 96a–120a). The court of appeals affirmed this ruling on the first appeal (App. C, *infra*, 54a–55a), and respondents did not challenge the ruling in this Court. Respondents' failure to seek certiorari thus eliminated from the case any claim that the Site 30 project might result in racial segregation. See *Otero* v. *New York City Housing Authority*, 484 F.2d 1122 (2d Cir. 1973).

The court of appeals affirmed on all but the NEPA issue (App. C, *infra*, 49a–62a). Without holding that an EIS was required,[8] the court concluded that HUD had violated Section 102(2)(E) of the Act, 42 U.S.C.

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[7] The complaint was filed on October 4, 1971, over a year before the Secretary entered into the annual contributions contract. For that reason, the complaint did not allege that the decision to fund the Site 30 project violated NEPA. The only claim against the Secretary was the allegation that HUD had violated federal housing laws (Compl. ¶14). On April 22, 1974, the district court granted plaintiffs leave to amend the complaint to allege (Tr. 673) that the Secretary had failed to comply with NEPA by not preparing an EIS before deciding to provide financial assistance. The amended complaint did not allege a violation of Section 102(2)(E) of the Act, 42 U.S.C. 4332(2)(E), an issue that was not raised until post-trial briefing.

[8] The court only stated that it agreed with the Secretary that an EIS was not required for the entire WSURA (App. C, *infra*, 61a).

4332(2)(E),[9] which requires all federal agencies to "study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources * * *" (App. C, *infra*, 55a-61a). In the court's view, this provision, which is independent of any duty to file an environmental impact statement, obliged the Secretary to consider housing alternatives to the project and to evaluate them on the basis of, among other things, the resulting "concentration" of low-income families in a single area.[10] The court remanded for consideration of these alternatives, stating (*id.* at 60a-61a):

> In this endeavor consideration might well be given to the entire West Side Urban Renewal Area, the percentage of low-income units in that particular location, the sizes, type and designs of existing and possible alternative housing, whether there may be ways of spreading low-income units throughout the area rather than concentrating them in a few plots such as Site 30, and whether rehabilitation of existing housing may be developed as a means of achieving the Plan's contemplated economic ratio. Those who live there and those who hope to live there are entitled to obtain their housing aided by federal funds in a balanced and integrated community as envisaged by the Plan. Nor is it sufficient to approach the problem on an Area-wide basis. The purpose of the Plan is integration—not concentra-

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[9] The court of appeals' opinion refers to Section 102(2)(D). In August 1975, two weeks after the court's decision, Section 102(2)(D) was redesignated as Section 102(2)(E) of the Act, 42 U.S.C. 4332(2)(E). See Act of August 9, 1975 Pub. L. No. 94-83, 89 Stat. 424.

[10] The court suggested, without saying so directly, that the district court erred in concluding that organized opposition to the project based on perceived social impact was not an environmental impact within the meaning of Section 101(b) of the Act, 42 U.S.C. 4331(b) (see App. C, *infra*, 59a).

> tion. That purpose would not be achieved by concentrating low-income housing on 91st Street and compensating for this segregation by an equal concentration of middle-income housing on 97th Street.

4. Following the remand, HUD conducted a thorough study of alternatives to the Site 30 project, which it submitted to the district court on April 15, 1977, in the form of a 200-page "Special Environmental Clearance" (J.A. 7-212).[11] The report concluded that the proposed construction of low-income public housing on Site 30 was, on balance, an appropriate and environmentally sound response to the needs and conditions of the WSURA, that the project "[would] have no significant environmental impact since, it will not substantially change the income, racial, ethnic or age distribution of the neighborhood or [the] community," and that it therefore should proceed as planned (*id.* at 54, 67-75). The report also stated that the proposed use of Site 30 was "clearly compatible with existing land-use and with development trends in the West Side" (*id.* at 27). Although it acknowledged that certain members of the community opposed the project on the ground that it would, in their view, threaten "the social balance" of the neighborhood (*id.* at 29), the report analyzed the neighborhood, found it to be stable, and determined that the project would not threaten to upset that stability (*id.* at 29-34).

In addition, the report noted that the 160-unit project would only introduce between 472 and 560 persons to the WSURA (J.A. 14, 60) and would result in only a 1.9% increase in the number of low-income units in the area (*id.* at 35, 54). The report conceded that the project would increase the number of public housing units in its immediate vicinity, but it identified at least five factors that already averted any "Chinese Wall" effect and suggested ten additional steps that could be taken to mitigate further any adverse social consequences (J.A. 56–58).

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[11] The study is summarized in detail in the district court's opinion on remand (App. B, *infra*, 18a-38a).

The report then considered numerous alternatives to the project, including (i) construction of the same or a similar project on another site; (ii) dispersal of low-income units on more sites; (iii) rehabilitation of existing buildings in WSURA; (iv) a rent subsidy program; (v) no project at all; and (vi) alternative uses for Site 30 (J.A. 67–75). One alternative—transferring the project to Site 9—would have resulted in a lower concentration of low-income housing, but it would have offered less recreational or parking area and would have required relocation of existing occupants and site clearance (*id.* at 69). Site 41 was also found to be an adequate alternative, but it (like Site 30) was originally programmed for subsidized moderate income housing and "[t]he impacts related to social fabric of the community may not be ameliorated with transfer of the 160-unit public housing project from Site 30 to Site 41" (*ibid.*). Indeed, the report speculated that conversion of Site 41 to low-income housing "might be even more strongly opposed" because many residents hostile to the Site 30 project lived even nearer to Site 41 (*ibid.*). And, as with Site 9, use of Site 41 would have required relocation of present occupants and site clearance.

Finally, the "most convincing" reason offered for not using Sites 9 or 41 was that at least two additional years of delay would result in meeting WSURA's "demonstrated" need for low-income housing (J.A. 69). The report remarked that "[t]he continued inability of [the] government to meet these needs" was itself "an adverse environmental effect" (*ibid.*) and that the benefits of transfer to another site were "insufficient to justify" these environmental costs (*id.* at 70).

The district court found that the "Special Environmental Clearance" contained "a very illuminating and factual discussion of all appropriate [alternatives] to construction of 100 percent low-income housing on Site 30" and that "HUD discharged its duty to examine alternatives with good faith objectivity" (App. B, *infra*, 41a).[12] It therefore vacated its preliminary injunction against the project and entered judgment for the defendants (*id.* at 48a).

5. The court of appeals again reversed and remanded, holding that the Secretary had violated NEPA in still another way (App. A, *infra*, 1a–11a). The court acknowledged that HUD had done a "careful analysis" and had "consider[ed the] alternatives" required by its first opinion (*id.* at 8a). "But 'consideration' " of the environmental factors, the court stated, "is not an end in itself " (*ibid.*). NEPA also imposes certain "substantive standards" (*id.* at 7a), an agency's compliance with which is subject to judicial review.

First, the court of appeals held that NEPA prohibits "economic concentration." The court observed that, to build a "17-story apartment building exclusively for low-income [families] in an area already containing a high percentage of low-income housing" might not cause racial "tipping," but "it is not the [economic] integration contemplated by NEPA" (App. A, *infra*, 7a). Second, the court held that under NEPA "delay is an impermissible factor as against a further concentration of low-income housing" (*id.* at 10a). The Secretary thus erred by regarding delay in providing the poor with decent housing as an "overriding factor" and by not giving "determinative weight" to avoiding a concentration of low-income housing (*id.* at 9a). In sum, although the court found that HUD had fully complied with the procedural mandate of NEPA, it concluded that the agency had violated the Act's "substantive" requirements. It therefore reinstated the injunction against any federal assistance to low-income housing on Site 30 and remanded once more for further proceedings (*id.* at 11a).[13]

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[12] The court added (App. B, *infra*, 42a–43a):

> We find that HUD's consideration of alternatives was neither arbitrary nor capricious. It was done in good faith and in full accordance with the law. * * * HUD's decision was based upon a consideration of all relevant factors, to wit, site selection and design, density, displacement and relocation of residents, quality of the built environment, impact of the environment on the current residents and their activities, decay and blight, implications for the city growth policy, traffic and parking noise, neighborhood stability, and the existence of services and commercial enterprises to service the new residents.
>
> HUD weighed the technical and economic advantages and disadvantages of building or not building on Site 30 together with the environmental costs and benefits flowing therefrom. HUD gave careful and detailed attention to all the environmental factors contemplated as relevant under NEPA. The agency is not expected to arrive at a perfect solution of all environmental consequences of a proposed Federal project. * * * We cannot disturb HUD's finding or rejection of alternatives as long as HUD's choice among them was reasoned.

REASONS FOR GRANTING THE PETITION

The decision of the court of appeals represents a serious misconstruction of an important federal statute. In holding that the National Environmental Policy Act forbids HUD from proceeding with a program to finance badly needed low-income housing in New York City, despite the agency's unquestioned compliance with the Act's procedural requirements, the court of appeals' ruling conflicts with this Court's repeated observation that "NEPA [sets] forth significant substantive goals for the Nation, but its mandate to the agencies is essentially procedural." *Vermont Yankee Nu-*

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[13] The court of appeals suggested that on remand HUD might consider financing a moderate-income project with a percentage of units reserved for low-income families "as envisaged by the original Plan" and that the agency should not ignore "recent developments or thinking with respect to a trend away from high-rise apartments * * *" (App. A, *infra*, 9a).

clear Power Corp. v. *NRDC*, 435 U.S. 519, 558 (1978). As the Court observed in *Kleppe* v. *Sierra Club*, 427 U.S. 390, 410 n.21 (1976):

> Neither the statute [NEPA] nor its legislative history contemplates that a court should substitute its judgment for that of the agency as to the environmental consequences of its actions. See *Scenic Hudson Preservation Conference* v. *FPC*, 453 F.2d 463, 481 (CA2 1971), cert. denied, 407 U.S. 926 (1972). The only role for a court is to insure that the agency has taken a "hard look" at environmental consequences; it cannot "interject itself within the area of discretion of the executive as to the choice of the action to be taken." *Natural Resources Defense Council* v. *Morton*, 148 U.S. App. D.C. 5, 16, 458 F.2d 827, 838 (1972).

See also *Aberdeen & Rockfish R. Co.* v. *SCRAP*, 422 U.S. 289, 319 (1975).

There is no dispute that HUD took a "hard look" at the environmental consequences of providing financial assistance to the Site 30 project. It produced an exhaustive report, identifying and investigating every environmental consequence, weighing every alternative, and discussing the relative advantages and disadvantages of the proposed federal action. The decision of the court below to substitute its judgment for that of the agency about the weight to be accorded these factors and the wisdom of low-income housing finds no support in NEPA and warrants this Court's review.

1. The only NEPA requirement at issue in the present case is Section 102(2)(E). That provision requires agencies to "study, develop, and describe appropriate alternatives to recommended courses of action" where a proposal involves "unresolved conflicts concerning alternative uses of available resources * * *." Assuming that the Site 30 project implicated such an "unresolved conflict," even the court of appeals acknowledged that the agency fully studied, developed and described ap-

propriate alternatives in light of their likely environmental impact (App. A, *infra*, 8a).

The court of appeals invalidated the agency's decision because it disagreed not with the procedures followed by HUD in reaching its decision but with the decision itself. In the court's view, the Secretary gave insufficient weight to the benefits of economic integration and undue emphasis to the goal of promptly providing low-income families with decent housing. However, because NEPA contains no special provision for judicial review, the Secretary's substantive decision could be set aside only if it was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. 706(2)(A).

The Secretary's decision was not arbitrary, capricious or an abuse of discretion. The United States Housing Act sets a national goal of remedying "the acute shortage of decent, safe, and sanitary dwellings for families of low income * * *." 42 U.S.C. 1437. Here, HUD determined that any alternative other than Site 30 would require at least a two-year delay in providing such housing for 160 families. In the meantime, due to the shortage of decent housing in the WSURA, those families and their children would be forced to live in substandard units, which would have severe human and environmental consequences.[14] On the other hand, HUD found that the project would increase the number of low-income housing units in WSURA by less than two percent, and it attached importance to a number of additional factors.[15] The resolution of these competing considerations, each of which was discussed by HUD at length, cannot be labeled as arbitrary, capricious, or an abuse of discretion.

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[14] The court of appeals concluded that delay was an impermissible factor because of the government's "continuing responsibility" under Section 101(b)(1) of the Act, 42 U.S.C. 4331(b)(1), "consistent with other * * * considerations of national policy," to "fulfill the responsibilities of each generation as trustee of the environment for succeeding generations * * *" (App. A, *infra*, 8a). But one "consideration of national policy" is the elimination of substandard housing. To that end, the United States Housing Act authorizes the Secretary to finance 100% low-income housing projects. 42 U.S.C. 1437a. Avoidance of delay in achieving this goal and the suffering that inevitably would accompany delay is "consistent with * * * considerations of national policy."

Nor was the Secretary's action "not otherwise in accordance with" NEPA. The appropriate weights to be assigned to competing policy factors are not preordained by NEPA; the Act expresses no preference between, *e.g.*, the environmental benefits of economic integration and the environmental benefits of providing decent housing promptly to families now living in dilapidated and rat-infested buildings. Moreover, even where there is an environmentally preferable alternative, NEPA does not insist upon its adoption. To the contrary, the requirement that federal agencies consider the environmental consequences of their proposed actions presupposes that weights must be assigned to both environmental and non-environmental factors and that the latter, on occasion, may prevail. Indeed, NEPA regulations issued by the Council on Environmental Quality, which are entitled to substantial defer-

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See *Fayetteville Area Chamber of Commerce* v. *Volpe*, 515 F.2d 1021, 1028 (4th Cir. 1975); *Alaska* v. *Andrus*, 580 F.2d 465, 475-476 (D.C. Cir. 1978).

[15] These factors included the following: (1) the adverse environmental impact of the proposed project would be minimal; (2) the benefits from relocation of the project to another site would be slight; (3) one of the two suitable alternative sites (Site 41) would be even closer to many of the objecting parties; and (4) the other suitable transfer site (Site 9) would involve relocation of existing occupants and a reduction in parking and recreational area (J.A. 67-75). Although the court of appeals' ambiguous reference to *Otero* (App. A, *infra*, 9a-10a) suggests that the project might lead to racial concentration, that conclusion was foreclosed by the first appeal, which affirmed the district court's factual finding that the project would not lead to "tipping" (see note 6, *supra*).

ence (see *Andrus* v. *Sierra Club*, No. 78-625 (June 11, 1979), slip op. 9), recognize that an agency may reject an environmentally preferable alternative in favor of a course the agency deems required by other essential considerations of national policy. 43 Fed. Reg. 55978, 55986, 55999 (§1505.2) (1978).

In sum, NEPA requires only that a federal agency give a "hard look" (*Kleppe* v. *Sierra Club, supra*, 427 U.S. at 410 n.21) at the environmental impact of a proposed decision. It does not dictate any specific substantive policy decision, and it surely does not authorize a court to recalibrate the competing factors and to require adoption of a substantive decision different from that reached by the agency. *Vermont Yankee Nuclear Power Corp.* v. *NRDC, supra*, 435 U.S. at 558.[16]

2. The decision of the court of appeals is in conflict with decisions in other circuits holding that NEPA only requires an agency to consider the environmental consequences of its proposed action, not to give determinative weight to an environmentally preferable alternative notwithstanding other important policy considerations. See, *e.g.*, *Matsomoto* v. *Brinegar*, 568 F.2d 1289, 1290-1291 (9th Cir. 1978); *Culpeper League for Environmental Protection* v. *United States Nuclear Regulatory Comm'n*, 574 F.2d 633, 634-645 (D.C. Cir. 1978); *City of Des Plaines* v. *Metropolitan Sanitary District*, 552 F.2d 736, 738 (7th Cir. 1977); *Save Our Invaluable Land, Inc.* v. *Needham*, 542 F.2d 539,

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[16] Of course, when an agency gives little or no weight at all to environmental values or when it rejects an environmentally preferable alternative for no apparent reason, its decision might be arbitrary and capricious. But that is a far cry from the court of appeals' holding that NEPA requires agencies to give environmental concerns specified weight, with the judiciary to do the specifying. Here, the court below agreed that HUD gave "careful analysis" to environmental factors (App. A, *infra*, 8a) but held that the agency's decision nonetheless to fund the Site 30 project violated the "substantive standards" of NEPA (*id.* at 7a).

542-543 (10th Cir. 1976), cert. denied, 430 U.S. 945 (1977); *Nucleus of Chicago Homeowners Ass'n* v. *Lynn*, 524 F.2d 225 (7th Cir. 1975).

In *Matsomoto*, for example, the Ninth Circuit held that "NEPA is essentially a procedural act" and that, once federal agencies are armed with the information required by the Act, "the decision, good or bad, may be made." 568 F.2d at 1290. Judicial "[r]eview of the decision on the merits * * * is not required" by NEPA, even though "[t]he project when finished may be a complete blunder * * *" (*ibid.*).[17] And in *City of Des Plaines*, the Seventh Circuit emphasized the distinction between review of the merits of an agency decision, on the one hand, and review of the adequacy of its consideration of environmental factors, on the other, and stressed that judicial oversight of NEPA's procedural requirements "does not open the back door to reargument of the merits of the decision proposed * * *." 552 F.2d at 738.[18] Moreover, the decision below is inconsistent with decisions holding that agencies may properly take delay in achieving policy goals into account under NEPA in rejecting alternative proposals. See, *e.g.*, *Fayetteville Area Chamber of Commerce* v. *Volpe*,

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[17] See also *Short Haul Survival Committee* v. *United States*, 572 F.2d 240, 249 (9th Cir. 1978); *Trout Unlimited* v. *Morton*, 509 F.2d 1276, 1282 (9th Cir. 1974); *Jicarilla Apache Tribe of Indians* v. *Morton*, 471 F.2d 1275, 1280-1281 (9th Cir. 1973).

[18] See also *Nucleus of Chicago Homeowners Ass'n* v. *Lynn*, *supra*, a case closely resembling the instant litigation, in which the court of appeals limited itself to scrutinizing HUD's compliance with the procedural dictates of NEPA in upholding the agency's decision to fund low-income public housing against the claims of local residents that it would drastically alter the character of the neighborhood. But cf. *Conservation Council of North Carolina* v. *Froehlke*, 473 F. 2d 664 (4th Cir. 1973), and *Environmental Defense Fund, Inc.* v. *Froehlke*, 473 F.2d 346 (8th Cir. 1972), in which the courts found authority under NEPA to review the merits of agency action.

515 F.2d 1021, 1028 (4th Cir. 1975); *Alaska* v. *Andrus*, 580 F.2d 465, 475 (D.C. Cir. 1978).

3. The court of appeals' decision threatens to permit courts to inquire into the wisdom of an agency's substantive policy decisions under the guise of ensuring compliance with NEPA. It is expected to have a particularly severe impact on the Secretary's administration of federally assisted housing projects. HUD anticipates that it will approve approximately 700 low-income public housing projects under the United States Housing Act in each of the next five years and that it will fund approximately 1,800 projects annually under other housing programs for low- and moderate-income residents.[19] Although the Secretary attempts to avoid approving projects that would concentrate subsidized housing in any one section of a metropolitan area (see 24 C.F.R. 200.710), each such project funded by HUD necessarily increases the "economic concentration" in its immediate vicinity and is subject, under the Second

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[19] Several HUD programs offer financial assistance for the construction of new housing for low-income families and are thus subject to the claim of "economic concentration." In addition to the program at issue here, 42 U.S.C. 1437f authorizes HUD to make housing assistance payments to private or public owners who agree to provide new or rehabilitated units for occupancy by "lower-income" families. These are families whose income do not exceed 80% of the median income for the area, as determined by the Secretary (42 U.S.C. 1437f(f)(1)). HUD anticipates that it will approve approximately 1,000 such projects annually. 12 U.S.C. 1701q authorizes HUD to make loans to induce nonprofit corporations to finance construction of rental or cooperative housing projects for the elderly or the handicapped. HUD estimates it will approve 320 such projects annually. 12 U.S.C. 1715*l* authorizes HUD to insure mortgages on new construction of multifamily housing for low- and moderate-income families and families displaced by governmental action or a major disaster. HUD estimates it will fund approximately 450 projects annually that are insured under this section, with an additional subsidy under 42 U.S.C. 1437f to permit occupancy by low-income families.

Circuit's approach, to endless litigation and judicial scrutiny of the merits of the final agency decision.[20] This is not a result Congress intended NEPA to achieve.

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[20] For example, in *King* v. *Harris*, 464 F. Supp. 827 (E.D. N.Y. 1979), appeal pending, No. 79-7144 (2d Cir.), the district court enjoined the Secretary from funding less than 100 units of lower income housing in New York under 42 U.S.C. 1437f. Relying on the court of appeals' decision in this case, the district court held that, even if the project would not result in racial segregation, it would result in an undue concentration of low-income housing. *Id.* at 843-844. At least five other cases are now pending in the district courts seeking to enjoin federal funding of low-income housing for alleged violations of NEPA or the holding in this case. *Blackwood* v. *Harris*, Civil No. 79-1297 (D.D.C., filed May 11, 1979) (12 U.S.C. 1701q); *Braucher* v. *Harris*, Civil No. CA-H-79-122 (S.D. Tex., filed Jan. 19, 1979) (42 U.S.C. 1437f); *Reed* v. *Harris*, Civil No. 3-78-1294F (N.D. Tex., filed Sept. 22, 1978) (same); *City of Plano, Texas* v. *Harris*, Civil No. M-78-69-CA (E.D. Tex., filed July 7, 1978) (same); *Dalzell* v. *Harris*, Civil No. 1-78-28 (N.D. Tex., filed July 5, 1978) (same).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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AUGUST 1979

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1079—September Term, 1977.

(Argued June 12, 1978 Decided December 14, 1978.)

Docket No. 78-7147

ROLAND N. KARLEN, ALVIN C. HUDGINS and CONTINUE,

Plaintiffs-Appellants,

—against—

PATRICIA ROBERTS HARRIS, Secretary of the Department of Housing and Urban Develepment, THE CITY OF NEW YORK and STRYCKER'S BAY NEIGHBORHOOD COUNCIL, INC.,

Defendants-Appellees.

Before:

MOORE, MULLIGAN and GURFEIN,

Circuit Judges.

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* * * * *

A. DAVID BENJAMIN, Esq., New York, N.Y. (Demov, Morris, Levin & Shein, Eugene J. Morris and Jonathan M. Bryer, of counsel), for *for Plaintiffs- Appellants.*

PETER C. SALERNO, Assistant United States Attorney for the Southern District of New York (Robert B. Fiske, Jr., U.S. Attorney, of counsel), *for Defendant-Appellee Harris.*

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JOHN DE P. DOUW, Esq., New York, New York (Catherine P. Mitchell, Community Action for Legal Services, Inc., of counsel), *for Defendant-Appellee Strycker's Bay Neighborhood Council, Inc.*

MOORE, *Circuit Judge;*

This is the second appeal to come before us in "a case directly affecting the future of a 20 square block community and its more than 35,000 current and former residents."[1] The particular site (Site 30) involved is part of the West Side Urban Renewal Area ("WSURA" or "Area"), and is located on the west side of Columbus Avenue, between West 90th and West 91st Streets, in the Borough of Manhattan, City of New York. *See*, 445 F.Supp. at 207 n.3. The area was to be developed in accordance with the West Side Urban Renewal Plan

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[1] *Trinity Episcopal School Corp.* v. *Romney*, 387 F.Supp. 1044, 1047 (S.D.N.Y. 1974). The area is in the west side of Manhattan, New York City, between West 87th and 97th Streets and between Central Park West and Amsterdam Avenue.

("the Plan"), which had as its objective the rehabilitation of the area on an integrated basis both racially and economically. A detailed description of the Plan, its development and various amendments is set forth in the trial court's first opinion, *reported at* 387 F.Supp. 1044 (1974).

An appeal from the decision approving the use of Site 30 for a low-income apartment building, which would be situated in a block containing other exclusively low-income buildings caused us to remand the case to the district court to ascertain from the Department of Housing and Urban development (HUD) what consideration had been given to other alternatives[2] so that "[t]hose who live [in the Area] and those who hope to live there [would be] entitled to obtain their housing aided by federal funds in a balanced and integrated community as envisaged by the Plan". We said: "The purpose of the Plan is integration—not concentration" and "[T]hat purpose would not be achieved by concentrating low-income housing on West 91st Street. . . ." *Trinity Episcopal School Corporation* v. *Romney*, 523 F.2d 88, 94 (1975). Accordingly, we remanded for the consideration by HUD of reasonable alternatives to the development of Site 30 as a 100 per cent low-income housing project "consistent with the scheme of the Plan."

On the remand, HUD produced a lengthy document, with many exhibits attached, entitled "Special Environmental Clearance of Department of Housing and Urban Development". It was filed with the district court on April 15, 1977. Thereafter defendants-appellees moved for summary judgment dissolving the injunction against building a 100 per cent low-income housing structure on Site 30 and dismissing the complaint. From the judgment dissolving the injunction and dismissing the complaint, plaintiffs-appellants appeal.

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[2] National Environmental Policy Act of 1969 §102(2)(D), 42 U.S.C. §4332(2)(D).

The trial court's opinion is reported at 445 F.Supp. 204. A motion (F.R. Civ. P. §60(b)) for correction of judgment was made by appellants and denied, from which denial plaintiffs-appellants also appeal.

Consideration of many of the environmental aspects relating to the construction of a 100 per cent low-income building on Site 30 which were treated in HUD's report (A 7-212)[3] is unnecessary. We remanded for the specific purpose of having "a study [made] by the appropriate agencies of possible 'alternatives' with respect to the present proposal to change the development of Site 30 to 100 per cent low-income housing." 523 F.2d at 95. We thought that "[I]f attention is paid to the Plan and its purposes, the agencies with the cooperation of the interested parties should be able to arrive at an equitable solution". Our attention, therefore, must center on that portion of the HUD report which deals with "Impact on the Social Fabric and Community Structures" (Ex. 8, A 54) and "Notable Impacts and Alternatives". (A 67).

A survey by the City of nine undeveloped sites found that none were "appropriate alternatives". Amongst the reasons cited were that "[s]ubstantial delays would be imposed in relocating the development to another site". (A 67). The City's Housing and Development Administration (HDA) made additional comments as to three sites which it believed to be unacceptable. As to HDA's survey, the HUD report said "the City's evaluation of alternative sites seems incomplete. It did not address the possibilities of combining sites, of reparcelizing [sic] sites, of dividing the 160-units committed to by HUD onto two of the redevelopment sites . . . . " (A 68). The report continued: "There are two alternative sites which are even more appropriate for the transfer of the proposed 160-unit development (perhaps with minimal design changes required) than those considered by the City" (A 68), namely, Sites 9 and 41. HUD stated that "[t]he City's most convincing reason in opposition to transfer of the project to an alternative site is the certainty of an additional long delay before construction could commence on any alternative site selected." (A 69). The added delay was estimated to be at least two years; whereas the HDA estimated that construction could start on Site 30 within six months. The City's need for low-income housing within the area was cited as an additional reason for retaining Site 30 for this purpose as well as possible litigation or protest by residents of the alternative areas.

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[3] "A" refers to the Joint Appendix submitted by the parties on appeal.

As to Site 9, HUD found that "[f]rom the standpoint of social environmental impact, this location [Site 9] could be superior to Site 30 for the development of low-rent housing" and that at Site 9 "the total concentration would be smaller . . . ." (A 69). As to Site 41, HUD said that this site "is a very appropriate alternative site" but feared opposition from the residents of the area "although it appears to be quite a rational decision, within the context of the Plan and its objectives to facilitate an integrated community". (A 67). Despite these pro and con arguments, HUD came to the conclusion that "[m]easured against the environmental costs associated with the minimum two-year delay, the benefits seem insufficient to justify a mandated substitution of sites". (A 70). HUD also expressed the view that "[t]he continued inability of government to meet these needs [more low-rent housing for people of low income] would be considered an adverse environmental effect of transfer to another site". (A 69).

HUD, in dealing with the question of "Dispersal of Low Income Units on More Sites", stated

> "For example, attitudes of low-income and minority persons toward street life are frequently conditioned by the economic limitations on their mobility and by their cultural heritage. Their use of public space is often in conflict with the values of middle and upperclass people, mobile and able to

> spend leisure time away from home. Differing social and cultural attitudes about territoriality and privacy, acoustical as well as spatial, could fuel the tension which excessively close physical relationships between 'vest-pocket' projects and high-cost housing might generate." (A 71).

In its analysis, HDA has said that "[t]he high level of economic integration in the area, however, makes concern about additional public housing on Site 30 seem unwarranted." (A 113)

This statement would appear to be at variance with the facts as stated by the parties in their briefs which are to the effect that West 91st Street is presently lined with low-income housing.

The question which now arises is: what is the role of a federal appellate court at this stage of the proceedings?

In the report of HDA, the City's Housing Authority and the City Planning Commission, dated November 17, 1976 (A 82) a history of the WSURA Plan is set forth, including amongst other things, a statement that "[t]he objectives were to accommodate the housing needs of all residents of all income levels . . . ." (A 88) and that "[t]he Urban Renewal Plan's objective is to create a racially and economically integrated community". (A 110). Apparently, because of the large numbers of low-income families living in sub-standard housing, the City changed these objectives. As a result, Site 30 was to be used for a 100 per cent low-income high-rise (17-story) apartment building.

In seeking the scope of our reviewing powers we must look to the Congressional source, the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §§4321, *et seq.* and the Administrative Procedure Act (APA), 5 U.S.C. §706(2)(A) which provides in part:

> "The reviewing court shall—
>
> * * *
>
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be—

> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . . ."

The provisions of NEPA contain the substantive standards necessary to review the merits of agency decisions under the APA. A mere reading of the HUD report reveals many warning signals which must be considered in relation to the local environment. The City proposes to build a 17-story apartment building exclusively for low-income tenants in an area already containing a high percentage of low-income housing. This alone constitutes concentration. Regardless of whether this would cause so-called "tipping", it is not the integration contemplated by NEPA.

Despite HUD's assurances that such a development would "not substantially change the income, racial, ethnic or age distribution of the neighborhood or community" (a questionable assumption) and that "[t]he proposed low-income project will have only a fractional effect on the economic balance of WSURA's population, . . ." (A 54) these area statistics will not affect the lives of the present residents on West 91st Street.

General comment about the "potential social environment impacts" is stated as follows:

> "While the choice of Site 30 for development as a 100 percent low-income project has raised valid questions about the potential social environmental impacts involved, the problems associated with the impact on social fabric and community structures are not considered so serious as to require that this component be rated as unacceptable." (A 58).

The importance of this decision lies in the fact that once a high-rise low-income apartment is built on Site 30, the character of the neighborhood is permanently established—at least for the life of the structure—if as represented, its adds to an already concentrated group of low-income buildings. This construction will not be a temporary stop gap to enable the City to solve its problem for adequate housing for its low-income population. The Congress did not authorize the use of federal resources for this single purpose. To the contrary it said, in part

> "it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans . . . and resources to the end that the Nation may . . . (1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations . . . ." (NEPA §101, 42 U.S.C. §4331).

HUD is not an agency merely to support whatever plan the City may find to be expedient in solving its problems. Its careful analysis of the various sites has shown that it has given "consideration" to alternatives. But "consideration" is not an end in itself. Ultimately there must be a decision and by some decision-maker.

We do not depart from our statement that the function of An Environmental Impact Statement (EIS) (here the Special Environmental Clearance) is to set forth "sufficient information to enable the decision-maker to consider fully the *environmental* factors involved and to make a reasoned decision after balancing the risks of harm to the environment against the benefits to be derived from the proposed action, as well as to make a reasoned choice between alternatives". *County of Suffolk* v. *Secretary of Interior*, 562 F.2d 1368, 1375 (2d Cir. 1977) *cert. denied*, 434 U.S. 1064 (1978).

The HUD Secretary herself has said (after commenting that the HUD report had extensively criticized the City's conclusions [HUD's BR. p. 35]):

> "The Clearance nevertheless concludes, reasonably, that transferring the site would only cause additional unnecessary delay, and might generate opposition from the project's new neighbors, while alleviating that of the plaintiffs in this action.

> Under these circumstances, the agency was not required by NEPA to choose an alternative location." (HUD's Br. at 35).

It is thus quite evident that delay (outranking all other environmental considerations) was a paramount factor in HUD's decision—witness, its statement that "[t]he City's most convincing reason in opposition to transfer of the project to an alternative site is the certainty of an additional long delay before construction could commence on any alternative site selected" (A 69), which statement immediately followed HUD's own conclusion, previously stated, that "[f]rom the standpoint of social environmental impact, this [Site 9] would be superior to Site 30 for the development of low-rent public housing". (A 69). But Congress, in authorizing federal aid and creating HUD itself, had exactly "social environment impact" in mind as expressed in the statute. Neither the City in its desire to take care of its low-income residents nor HUD itself had the power to override this Congressional purpose. Therefore, consistent with our position taken in *Otero* v. *New York City Housing Authority*, 484 F.2d 1122 (2nd Cir. 1973), we hold that delay is not to be regarded as an overriding factor and that environmental factors, such as crowding low-income housing into a concentrated area, should be given determinative weight.

On remand, it may well be that consideration should also be given by HUD to the construction of a building containing a reasonable percentage of moderate-income residents as envisaged by the original Plan. Nor should recent developments or thinking with respect to a trend away from high-rise apartments, particularly where children would be involved, be ignored.

The fact that the development of Site 30 was authorized prior to the recently expressed thoughts on the subject of the wisdom of high-rise apartments, even though not retroactive, should not deter HUD from giving consideration to them. No construction has yet been commenced. It would be folly not to heed the most modern thinking on the subject where a major undertaking is involved. After all, what doctor would fail to use the most recently discovered curative medicine merely because the patient had become ill prior to its discovery?

Although we regret further delay, we hold that delay is an impermissible factor as against a further concentration of low-income housing on West 91st Street as presently proposed by the use of Site 30 for that purpose. Once the area is committed to a high concentration of low-income housing, the Congressional purpose of racial and economic integration is thwarted. We reiterate what we said in *Otero*:

> "An additional source of the affirmative duty to integrate is found in the 1968 Fair Housing Act . . . which provides that '[i]t is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States,' 42 U.S.C. §3601 and, in §3608, that '(d) The Secretary of Housing and Urban Development shall . . . (5) administer the programs and activities relating to housing and urban development in a manner affirmatively to further the policies of this subchapter'."
>
> * * *
>
> "However, we are satisfied that the affirmative duty placed on the Secretary of HUD by §3608(d)(5) and through him on other agencies administering federally-assisted housing programs also requires that consideration be given to the impact of proposed public housing programs on the racial concentration in the area in which the proposed housing is to be built. Action must be taken to fulfill, as much as possible, the goal of open, integrated residential housing patterns and to prevent the increase of segregation, in ghettos, of racial groups whose lack of opportunities the Act was designed to combat." 484 F.2d at 1133–34.

To fulfill our conception of Congressional purpose we must take a somewhat negative position as to what is not to be done, namely, the construction of a high-rise apartment building exclusively for low-income families on Site 30. HUD has shown that there are ways to avoid such a concentration. Pending such a solution we reinstate the injunction against the construction of a low-income apartment on Site 30 and remand to the district court for further consideration in the light of this opinion.

APPENDIX B

TRINITY EPISCOPAL SCHOOL CORPORATION
AND TRINITY HOUSING COMPANY, INC., PLAINTIFFS,

and

ROLAND N. KARLEN, ALVIN C. HUDGINS AND
CONTINUE, PLAINTIFFS-INTERVENORS,

v.

PATRICIA ROBERTS HARRIS, SECRETARY OF
DEPARTMENT OF HOUSING
AND URBAN DEVELOPMENT, ET AL., DEFENDANTS,

and

STRYCKER'S BAY NEIGHBORHOOD COUNCIL, INC.,
DEFENDANT-INTERVENOR.

No. 71 Civ. 4315 (IBC).

United States District Court,
S. D. New York

Jan. 19, 1978

OPINION

IRVING BEN COOPER, District Judge.

The Government has moved to dissolve the Order entered by this Court on September 25, 1975, which enjoined construction on Site 30 of the West Side Urban Renewal Area. Additionally, the Government has moved for summary judgment dismissing the complaint. Both motions are granted.

Before embarking on the discussion of the issues now before the Court, a very brief recital of the history pertaining to the instant applications is appropriate.[1] This action was commenced by plaintiffs Trinity Episcopal School Corporation (hereinafter "Trinity") and Trinity Housing Company, Inc.,[2] to enjoin conversion of the housing project planned for Site 30[3] of the West Side Urban Renewal Area ("WSURA") from 30 per cent low-income housing to 100 per cent low-income housing and to prevent the use of federal funds therefor. Plaintiffs Roland H. Karlen, Alvin C. Hudgins and CONTINUE (Committee Of Neighbors To Insure a Normal Urban Environment) later intervened. The named defendants included, *inter alia*, the United States Department of Housing and Urban Development ("HUD") and the City of New York. Strycker's Bay Neighborhood Council, Inc., was allowed to intervene as a defendant.

At the original trial of this action, we were presented with four issues for resolution: (1) whether the defendants had breached their contract with Trinity; (2) whether the defendants had failed to conform with the purposes and intent of the West Side Urban Renewal Plan promulgated by City and State agencies to rehabilitate a portion of WSURA which includes Site 30;

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[1] A fuller chronicle of the lengthy and convoluted turmoil incident to this litigation is set forth in our opinion *Trinity* v. *Romney*, 387 F.Supp. 1044 (S.D.N. Y. 1974).

[2] By Stipulation and Order filed December 16, 1977, plaintiffs Trinity Episcopal School Corporation and Trinity Housing Company, Inc., withdrew from the litigation. Consequently, only plaintiffs-intervenors are left to carry this action forward.

[3] Site 30 is located on the west side of Columbus Avenue, between West 90th and West 91st Streets, in the Borough of Manhattan, City of New York. The West Side Urban Renewal Area, about twenty blocks in area, is north between West 87th and West 97th Streets, and west between Central Park West and Amsterdam Avenue.

(3) whether the concentration of low-income housing in Trinity's immediate area would create an impermissible "pocket ghetto" of a nonintegrated nature; and (4) whether HUD had complied with the requirements of the National Environmental Policy Act (hereinafter "NEPA"). We found in defendants' favor on all four issues.

The Court of Appeals affirmed our judgment on the first three issues, but remanded the case back to us and as the fourth. *Trinity v. Romney*, 523 F.2d 88, 95 (2d Cir. 1975). We had found HUD's determination that construction of low-income housing on site 30 would not "significantly [affect] the quality of human environment" was not an arbitrary and capricious decision. We had therefore held that an Environmental Impact Statement ("EIS"), otherwise required by Section 102(2)(C) of NEPA, Section 4332(2)(C), Title 42 of the United States Code, would not be necessary. *Trinity*, 387 F.Supp. at 1077, 1082. Consequently we concluded, erroneously, that HUD did not have to consider alternatives to construction of low-income housing on Site 30.

Upon that error the Court of Appeals reversed and remanded holding that Section 102(2)(D) of NEPA, Section 4332(2)(D), Title 42 of the United States Code,[4] independently of Section 102(2)(C) of NEPA, imposed upon a federal agency the obligation to consider alternatives wherever a proposed federal action involves unresolved conflicts concerning alternate uses of available resources. *Trinity*, 523 F.2d at 93. The mandate by our Court of Appeals to us is clear and explicit (523 F.2d at 95):

> We find that HUD's acceptance of the "no alternatives" conclusion as a matter of law fails to meet

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[4] Since the Court of Appeals announced its decision, Section 102(2)(D) of NEPA has been redesignated Section 102(2)(E). However, for clarity and convenience we will continue to refer to it as Section 102(2)(D).

> the directive of 102(2)(D) of NEPA. We remand so that the District Court can fashion an appropriate order requiring HUD to consider reasonable alternatives to the development of Site 30 as a 100 percent low-income housing project to the fullest extent possible using HUD regulations as guidelines for the type of alternatives and the context of urban environmental factors to be used in the process of consideration of alternatives, consistent with the scheme of the Plan.

The Circuit Court disapproved HUD's action in simply adopting the conclusion of the New York City Housing Authority ("City Housing Authority") that there were no alternative site locations because of the scarcity of land in WSURA (523 F.2d at 94):

> This blanket generalization unsupported by the evidence as to alternative sites within the area (not to mention other potential sites) does not conform with HUD's responsibilities. HUD is not required to search out potential sites throughout the New York metropolitan area but the federal agency must itself determine what is reasonably available especially where as here the building of public housing is part of a coordinated plan to deal with the broad problem of meeting the housing needs of low income residents.

In delineating what HUD's consideration of alternatives should embrace, the Circuit Court required HUD to investigate alternatives not from a viewpoint as to how HUD or the City Housing Authority would choose to resolve the City's low-income housing situation, but "as to how within the framework of the Plan its objective of economic integration can best be achieved with a minimum of adverse environmental impact" (523 F.2d at 94):

> [HUD's search should take in] the entire West Side Urban Development Area, the percentage of low-

> income units in that particular location, the sizes, types and designs of existing and possible alternative housing, whether there may be ways of spreading low-income units throughout the area rather than concentrating them in a few plots such as Site 30, and whether rehabilitation of existing housing may be developed as a means of achieving the Plan's contemplated economic ratio . . . Nor is it sufficient to approach the problem on an Area-wide basis. The purpose of the Plan is integration—not concentration.

The factors to be considered by a federal agency before deciding to build in an urban environment were enumerated by the Circuit Court (523 F.2d at 93-94): site selection and design, density, displacement and relocation, quality of the built environment, impact of the environment on the current residents and their activities, decay and blight, implications for the city growth policy, traffic and parking, noise, neighborhood stability, and the existence of services and commercial enterprises to service the new residents. Against these factors, the Circuit Court held that HUD was required by NEPA and its own regulations to consider a variety of alternatives (523 F.2d at 94): alternative locations or sites, alternative of not building, alternative designs both in use of site and size of individual apartment units and number of total units, dispersal of the low-income units on more sites in WSURA, alternative measures for compensating or mitigating environmental impacts, and finally, alternatives requiring action of a significantly different nature which would provide similar benefits with different impacts such as rehabilitation of existing buildings in WSURA as public housing projects.

Pursuant to the mandate of our Circuit, on September 25, 1975, we enjoined further construction of public housing on Site 30 until the mandate had been complied with. On April 25, 1977, HUD filed with this Court its completed Special Environmental Clearance (hereinafter "Clearance"). Subsequently, on September 21, 1977, the Government moved to dissolve the Court's Order of September 25, 1975, and for summary judgment dismissing the complaint in its entirety contending that the mandate of the Second Circuit had been complied with. Plaintiffs filed their answering papers on October 25, 1977; oral arguments were heard October 26 and reply papers received on November 11 and 14.[5] The Government's applications are now ready for decision.

Plaintiffs strenuously disagree with the Government that HUD has complied with the mandate of the Second Circuit. Plaintiffs insist that the "matter" be returned to HUD for further proceedings. Among the objections voiced by plaintiffs is that HUD followed Section 102(2)(C)(iii) and not Section 102(2)(D) as the Circuit Court specified. Furthermore, plaintiffs claim that in proceeding according to Section 102(2)(C) HUD avoided having to hold public hearings, a course which plaintiffs assert is necessitated by Section 102(2)(D). Plaintiffs also submit that had "the proper procedure . . . been followed, and a correct analysis . . . made of the elements being evaluated, it would have been established that 160 units of low-income public housing should not be built on Site 30 and the funds for such housing should be transferred out of the area [WSURA] to another site where such housing is needed and there are a number of such sites available." Plaintiffs' *Memorandum of Law* dated October 24, 1977, at page 4.

Plaintiffs additionally contend that (1) the Clearance prepared by HUD as to alternatives is a "rubber stamp" of the position of defendants in this action;[6] (2) the Clearance was prepared by individuals who are not residents of WSURA; (3) defendant Strycker Bay dominated the input and preparation of the materials included in the Clearance and the conclusions set forth in it; and (4) that the Clearance is unreasonable, arbitrary and capricious. As appears below, we find plaintiffs' conclusory assertions to be without merit either in law or fact and, accordingly, we grant the Government's motions.

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[5] We denied plaintiffs' request to surreply.

[6] Presumably, by this plaintiffs mean that the Clearance is a "rubber stamp" of the City's position.

THE CLEARANCE

The Clearance prepared by HUD and filed with this Court on April 25, 1977, is a substantial document in excess of two hundred legal-size pages. The first four pages identify the project and summarize the conclusions reached by the Clearance. The next six pages are a technical analysis of whether Site 30 is appropriate for construction of the type and size of housing which is proposed for the site from the viewpoint of the following criteria: slope stability, foundation conditions, terrain, soil permeability, water supply, impact on sanitary sewer system, impact on energy resources, and effect on neighborhood character.

The next 59 pages of the Clearance comprise the actual study ("Study") completed by HUD in compliance with our Order. The remaining 150 pages are exhibits and attachments in support of the conclusions reached in the Clearance.

To prepare the Clearance, HUD solicited the views of those local agencies directly involved with construction on Site 30—the New York City Planning Commission, the Housing and Development Administration and the New York City Housing Authority. HUD requested each of the three local agencies to review and comment on alternatives to construction of low-income housing on Site 30. HUD also requested the agencies to provide information on a number of environmental factors relevant to HUD's assessment (Study, p. 1). In addition to soliciting views from local government agencies, HUD also sought views from the public bearing on the environmental significance of the proposed construction on Site 30. This was done through a published public notice on October 28, 1975.[7]

On the first page of the Study, HUD specifically refers to the decision of the Court of Appeals in the instant litigation and quotes that the decision required HUD

> to consider reasonable alternatives to the development of Site 30 as a 100 per cent low-income housing project to the fullest extent possible using HUD regulations as guidelines for the type of alternatives and the context of urban environmental factors to be used in the process of the consideration of alternatives, consistent with the scheme of the Plan.

Nine pages of the Study (pp. 12-20) are devoted to a detailed examination of the character of the neighborhood of WSURA. In assessing all reasonable alternatives to the fullest extent possible, HUD prepared a rigorous analysis of the existing WSURA community. We are impressed with it as being thorough and exhaustive. Among the factors surveyed in this Study are the stability of the minority population in WSURA and the extent of economic integration. On the former point the Study concludes (at pp. 17-18):

> Key social indicators such as incidence of welfare dependency and number of broken families show the WSURA tenancy to be significantly more stable than public housing tenancy generally. The high

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[7] The New York Times advertisement, 3″ by 7″ long, was in the Real Estate section; it invited the public to submit "relevant facts bearing on the issue of the project's environmental significance . . . " Of course, plaintiffs knew that HUD was preparing such a Clearance and submitted through their counsel 45 letters apparently gathered by plaintiff CONTINUE from its members. The responses from the public (including the immediate foregoing) are collated and analyzed in Exhibit A 6 of the Clearance.

> percentage of elderly, the smaller number of children, the lower proportion of minority dominance, all contribute to this agreeable social profile . . . [T]he percentage of minors in WSURA projects [is] substantially below the customary proportion in public housing. Also noteworthy is the higher percentage of families with two adults employed.

As to the welfare recipients in WSURA, whose number HUD took to be an indicator of social pathology, the Study reviews the data and states (at p. 18) that

> [it shows] a remarkable stability in the incidence of welfare recipiency in WSURA for the first five years of this decade, numerous allegations to the contrary [notwithstanding]. The numbers suggest that the welfare tenancy of the newer, economically integrated buildings in WSURA derives largely, if not exclusively from the re-housing of title-vested relocatees from temporary holding sites. By contrast, we note a substantial increase in home relief cases (without children)—citywide, borowide, community districtwide, and, in the area which surrounds WSURA.

In assaying the character of the West Side Urban Renewal Area, the Study observes that "The neighborhood social character . . . is one of health diversity in race, ethnicity, and income, with no convincing evidence of community instability." Study, p. 18. Earlier, the Study notes (p. 13) that

> [i]n terms of investment, density, land use, development patterns and other physical components of neighborhood character, [Site 30] is clearly suitable for the proposed project. Serious questions have been raised about the suitability of the site from the viewpoint of the social character of the neighborhood, because of the existing concentration of low-rent housing units in the immediate vicinity of Site 30. WSURA is generally recognized

> to be a racially, ethnically and economically integrated area, where widely, but not universally held preferences for diversity and commitment to integration have helped to reduce social distance between disparate subcommunities.

After carefully weighing and sifting the extensive data HUD has compiled regarding WSURA, the Study rejects the allegation that development of more low-income housing, particularly at the location of Site 30, would jeopardize the social balance of the larger community within WSURA. HUD concludes that increased criminal activity, which plaintiffs claim would accompany the proposed construction on Site 30, does not stem from low-income housing *per se:* It is a function of "the very elements of urban life prized by the community—size, density, diversity, wealth of open space and public facilities which attract 'outsiders' from proximate areas of lesser social stability." Study, p. 18.[8]

The Study devotes a considerable space (pp. 21-23) to reviewing congestion in the neighborhood schools serving WSURA and concludes that most schools in WSURA are underutilized and could easily accommodate the students expected to be generated by a 160 unit low-income project as planned for Site 30. The Study describes the availability of employment both within and without WSURA and the accessibility of public transportation to residents of WSURA. The Study further states that the work force of 145 primary wage-earners and 13 secondary wage-earners, expected to reside in the low-income building contemplated for Site 30, would only have a negligible effect on the extensive mass transit facilities available throughout WSURA (Study, p. 49). HUD notes that while the City's zoning permits only 20 on-site parking spaces, they would be fully adequate:

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[8] Before stating its conclusions, the Study indicates the pertinent data and facts it relied upon. See *County of Suffolk v. Secretary of the Interior*. Nos. 1187, 1258, 562 F.2d 1368 (2d Cir. 1977). Similar treatment appears throughout the entire Study.

> Forthcoming increases in gasoline fuel prices can be expected to reduce the extent of auto ownership among low-income motorists. The enforcement of alternate side [of the street] parking restrictions in the area is also an effective disincentive to auto ownership in the area.

(Study, p. 49).

Also encompassed within the Study is a consideration of whether Site 30 is adequately served by stores for shopping and whether there are sufficient playgrounds and open space (Study, pp. 24–25). HUD concludes that the recreational area annexed to the Site 30 project will accommodate the diverse needs of the project's residents and will also provide an attractive addition to the WSURA streetscape (Study, p. 46).

Hospital and social services in WSURA will only be minimally affected by the 160 households added by the use of Site 30 for low-income housing. HUD notes (at p. 47) that

> the stability, industriousness and independence of families living in NYCHA [New York City Housing Authority] projects in WSURA is markedly superior to typical public housing tenancy. Sensitive tenant selection, with full priority rights for former site occupants . . . could assure a project population with a high percentage of employed heads-of-household, a low index of welfare dependency and minimal requirements for extensive public services.

An extensive section of the Study (pp. 26–30) is devoted to a detailed and full discussion of the availability of police and fire protection within WSURA in general and for Site 30 in particular. While there are no fire companies within the geographical area of WSURA, several companies are stationed nearby and their response time to Site 30 is two minutes—well within national standards (Study, p. 26). The Study refers to a review by the New York City Fire Department, and, according to the Fire Commissioner, it has no objections regarding accessibility and availability of fire protection for the project intended for Site 30.[9]

The apparent inadequacy of police services, which was the subject addressed most often in the responses HUD received from its advertisement, is extensively reviewed. Site 30, located in a police precinct of 0.91 square miles, is considered to be in a high crime area. We had remarked, *Trinty, supra* at 1070, that crime figures from 1971 to 1973 had shown a marked decline: however, the Study notes (pp. 27-28) that since 1974 statistics indicated a marked increase in the number of homicides, rapes, burglaries, robberies and grand larcenies committed in the general area of WSURA. From 1973 to 1976, the number of criminal complaints filed in the precinct serving Site 30 has increased at a slightly greater rate than the rate for the Borough of Manhattan. Pursuing the examination further, the Study discloses (p. 28):

> Felony crime rates in 1973, however, were at a relatively low point in recent history of the 24th Precinct [covering Site 30] and reflected the marked decrease since 1971 . . . . Therefore, a wider study was indicated, using 1971 as the base year. From [New York Police Department] annual statistical reports for the year 1971 through 1976, a broader tabulation of complaints within the 24th Precinct

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[9] Indeed, to the extent the project on Site 30 accommodates relocatees now resident in temporary holding areas (which could be demolished or rehabilitated when vacated), there may be a net reduction in required fire department services by the elimination of non-fireproof and possibly inadequately wired tenements from the area (Study, p. 48).

> was complies [sic] . . . . Use of the year 1971 as a base yields different conclusions about the increase in felony crime in the 24th Precinct. The total number of felony complaints, which had dropped 32.6 percent from 1971 to 1973, has been rising steadily but, at the end of 1976, still stood 9.4 percent below the 1971 level.[10]

In assessing the relationship between criminal activity and population, the Study observes that since 1970 there has been a sizeable net increase in the population of WSURA as numerous housing projects were completed and occupied (Study, p. 29).

The Study confesses (p. 29) the absence of objective yardsticks to measure the adequacy or inadequacy of police protection. It attributes this to the fact that "adequate police protection" is, to an extent, defined subjectively and would necessarily reflect the differing perceptions of the various segments of the neighborhood population. Nonetheless, the Study considers the number of arrests to be a relevant and objective factor. HUD acknowledges that though the 24th Precinct ranked 13th in felony complaints, it ranked 23rd among the 73 City precincts in felony arrests. The consideration HUD gives to the problem of police protection is perceptive and balanced (Study, p. 30):

> The data and analysis presented . . . show a high incidence of crime in the precinct, a fair share of which occurs in WSURA, particularly crimes

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[10] Percentage changes between 1971 and 1976 for individual categories of offenses are (Study, p. 28):

Category	*Change*
Murder and Non-negligent manslaughter	+153%
Forcible Rape	+112%
Robbery	29%
Felonious Assault nc [no change	?1
Burglary	4%
Grand Larceny	17%
Grand Larceny-Motor Vehicle	20%
Other Felonies	14%

> against property and those crimes against the person which involve property; the "fair share" appears based on population. The arrest record of the 24th Precinct suggests need for improvement, which its new Commander may be undertaking. Based on the above, a marginal rating is assigned to this component, but a recommendation is hereby made to accept the marginal component because of minimal impact, and the general ability of the New York Police Department to allocate additional resources to the 24th Precinct on a showing of need.

The Study concludes (p. 48) that the presence of low-income housing on Site 30 is not likely to have any discernible impact on the police services in the community. HUD's conclusion is based on its expectation that the City Housing Authority will tenant Site 30 with great care.[11]

HUD similarly reviews (pp. 32–33) the adequacy of social services, senior centers, youth services, and transportation services. It concludes that the present aforementioned services are adequate to meet the needs of the estimated 500 new inhabitants who would be living within the proposed housing on Site 30[12] (Study, p. 47.)

The inadequacy of sanitation services, a frequent complaint in the responses HUD received from the public, is a problem which HUD notes is not confined to

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[11] Indeed, the operation of Site 30 by the City Housing Authority may actually reduce the demand on City police services because Housing Police will be assigned to on-site patrol functions (Study, p. 48).

[12] The exception is day care facilities for infants. HUD notes that these are failing to meet the substantial demand in WSURA (Study, p. 32). However, as this shortage is equally acute throughout the City and not peculiar to the immediate environs of Site 30 or WSURA, it is not a relevant factor in weighing alternatives to construction on Site 30.

WSURA; it pervades the city.[13] However, HUD concludes on the basis of field observations by its staff in 1977 that the community appeared clean and well-serviced by municipal sanitation workers (Study, p. 34).[14]

A crucial segment of the Clearance discusses the impact construction of low-income housing will have on the social fabric and community structures of WSURA (Study, pp. 38–42). WSURA, according to HUD, is racially, ethnically, and economically integrated. For various reasons the prospective residents of Site 30 are expected to reflect the same demographic characteristics of WSURA. The explanation offered (p. 38) is the small size of the project proposed for Site 30 (160 units or about 500 tenants) as well as the fact that first priority for occupancy will be given to title-vested tenants of WSURA who are now resident within the area on temporary holding sites, with a second priority in occupancy for former residents of WSURA who wish to return.

HUD also concludes that a 160 unit fully low-income project will only have a fractional effect on the economic balance of WSURA's population,[15] and that even if the impact is limited to the 25 already existing projects constructed or redeveloped in WSURA, the net increase of low-income families will be less than two percent. Within the context of the larger community, the approximate order of magnitude for the increase of low-income families will be one percent (Study, p. 39).

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[13] The minutes of the Local Community Board indicate that the problems of sanitation (or lack thereof) affect the entire area within its baliwick (from 59th Street on the south to Cathedral Parkway on the north, from the Hudson River east to Central Park). Indeed, because the problem "[is] due to a shortage of personnel and equipment, there would be little improvement until the general public helped itself as a result of a public relations program and participation by Block Associations and the general public in enforcement and clean up." Study, p. 34. Thus, siting low-income housing elsewhere in WSURA or, for that matter, in the West Side would present the same problem with sanitation as encountered on Site 30.

[14] "[T]he premises of other [New York City Housing Authority] projects in WSURA have invariably been clean and orderly when visited on numerous occasions by HUD staff." Study, p. 48.

HUD squarely addresses an issue raised by the Circuit Court, *Trinity*, *supra*, at pp. 94–95, and ardently fostered by plaintiffs throughout the entire history of this litigation: the concentration of public housing within a severely limited area of WSURA. If Site 30 is developed as 100 percent low-income housing, West 91st Street from Amsterdam to Central Park West will border buildings containing 837 of the 1231 public housing units in the area (Study, p. 40). Defending the wisdom of Site 30 as the choice for additional public housing, the Study observes that

> [t]he siting of 68 percent of all public housing units on a single one of the 11 crosstown axes in the area may display either insufficient sensitivity to public attitudes and urban design principles, or it may re-

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[15] The Study (p. 38) demonstrates this fractional effect by means of the following table:

	Without P.H. Project on Site 30 WSURA		With P.H. Project on Site 30 WSURA	
Units in economically integrated buildings	4382	84.6%	4382	82.1%
Units in low-rent housing projects	795	15.4%	955	17.9%
Units for middle/ moderate income	3390	65.5%	3390	63.5%
Units for low-income	1787	34.5%	1947	36.5%
Units occupied by middle/moderate income *	3303	63.8%	3303	61.9%
Units occupied by low-income *	1874	36.2%	2034	38.1%

* Assumes continued occupancy of 87 middle/moderate income units by families receiving welfare rent assistance.

> flect a calculated administrative or political decision made after consideration of several factors which tend to mitigate the potential adverse reaction to the decision.

Study, p. 40. HUD listed (p. 40) the factors as follows:

> (1) The physical appearance of the public housing project structures, existing and planned, is generally harmonious with other, nearby housing developments, and is mostly not stereotypical of New York City public housing design and construction.
> (2) Compliance with WSURA Plan requirements for open space will produce an open profile on the Site 30 block, and avert a potential "Chinese Wall" effect from the adjacency of the Site 30 project and Stephen Wise Tower.
> (3) One hundred of the public housing units along the 91st Street axis are located in 15 [rehabilitated] brownstones which blend into their surroundings with indifferent success. Street number signs and certain other common touches identify these structures and set them apart from their neighbors, but their appearance does not scream out—"Public housing!"
> (4) The tenant characteristics point to an impressive level of social and familial stability in the WSURA public housing project.
> (5) Active efforts, through such programs as the Goddard-Riverside Community Center's youth program supported by CJCC, to modify anti-social behavior by area juveniles.

HUD concedes that low-income housing on Site 30 will distress the sensibilities of certain residents of the immediate area. In conseqsence, HUD has directed the City Housing Authority to take measures to ameliorate the impact of the housing. These measures include (pp. 40–42):

> (1) requirements placed on the turnkey developer to select materials for exterior walls and surfaces

which, in color and texture, depart from the materials commonly used in public housing projects.

(2) requirements placed on the turnkey developer to incorporate into the exposed exterior surfaces of the building such details or treatments which will contribute to the distinctiveness of the structure.

(3) requirements placed on the turnkey developer to assure, either through choice of materials or treatment thereof, exterior or walls on the north and east facades particularly which will be either graffiti-resistant or will readily permit effective and easy removal of graffiti [sic].

(4) sensitive tenant selection by the Housing Authority, whose tenant screening and selection procedures at the controversial Forest Hills public housing project produced a project population which has been successfully integrated into the surrounding community with astonishing rapidity and lack of conflict.

(5) strict compliance with the City's commitments to provide priority in occupancy to present and former title-vested site occupants only.

(6) potential involvement of community leadership, perhaps through the vehicle of Community Board 7, in the tenant selection process, to the greatest extent permitted by law and regulation.

(7) the assignment of qualified Housing Authority personnel, after initial occupancy commences, to provide the full spectrum of tenant services available at the Authority.

(8) the assignment of adequate Housing Authority police protection for the residents of the cluster projects around the intersection of W. 90th Street and Columbus Avenue. While the primary function would be to augment the City police services in this high-crime precinct, their visible, uniformed presence might also still some unreasoned fear of middle and upper-income class residents, and would certainly contribute to an atmosphere of orderliness in the area.

(9) an affirmative pursuit by the Housing Authority of community services to occupy the project's

> community space. In view of the unmet demand for day care and youth services, these might be the most appropriate uses. The authority should consult at an early date, with the director [s] of Goddard-Riverside Community Center . . . and Goddard-Riverside Day Care Center . . . on these matters. Since Goddard-Riverside Community occupies space in both Stephen Wise Towers and in the vest-pocket project diagonally opposite Site 30, they would be the most logical group to operate and provide such services as infant and child day care, or perhaps an after-school center. While the latter might attract children from the neighboring projects as well as Site 30, it could serve as a neighborhood resource, as does the community center in the Forest Hills project.
>
> (10) an affirmative pursuit by the Housing Authority to attract commercial occupants for the large ground-floor commercial space in the project. Choice of tenant(s) should be made on the basis of neighborhood, as well as project needs to maximize social interactions between project residents and their neighbors.
>
> At page 42 of the Study HUD concludes [that] while the choice of Site 30 for development as a 100 percent low-income project has raised valid questions about the potential social environmental impacts involved, the problems associated with the impact on social fabric and community structures are not considered so serious as to require that this component be rated as unacceptable.

HUD conditions its approval of the low-income housing planned for Site 30 on the City's good faith compliance with the ameliorative measures HUD outlined. Towards seeing that the substance of each recommendation is implemented, the City Housing Authority is required to submit quarterly progress reports during the project's development and yearly reports thereafter (Study, p. 42).

ALTERNATIVES

The Study devotes pages 51 to 59 exclusively to a consideration of alternatives to construction of low-income housing on Site 30. To that objective, HUD directed the City of New York to survey the remaining nine undeveloped sites in WSURA. After that survey was completed, the City concluded (see Study, p. 51) that none of the sites were appropriate alternatives since (a) transferring the 160 units of low-income housing to another site would not silence opposition by certain segments of the WSURA community; it would only cause relocation elsewhere; (b) the substitution of any of the seven large sites would result in "under-utilization of good sites"; (c) demolition and relocation would be required for use of any alternative site and the costs thereby incurred would be, as described by the City (see Study, p. 51). "a financial hardship"; (d) tentative sponsors have been designated for each of the alternative sites; and (e) substantial delays would be imposed in relocating the development to another site.

The City also studied three sites *in extenso* but concluded that they would not be "appropriate alternatives" to proceeding with the development of Site 30 as planned. HUD summarized the City's conclusions as follows (Study, p. 52):

> (a) Site 23, a mid-block parcel between W.92 and W.93 Streets, can accommodate 130 units. The City currently contemplates an urban renewal plan change to delete from planned demolition and to retain two sound structures on W.93 St. and designate them for rehabilitation. The reduced size of Site 23 could take between 80 and 100 housing units of new construction, following relocation of tenants and demolition of one additional occupied structure on site. Time delays are also considered significant.
>
> (b) Site 45/46, an L-shaped site on the northeast corner of Columbus and W.87 and extending along

> the Avenue frontage to W.88, is planned for 106 units. It has only ⅔ the area of Site 30, and is not considered a viable alternative because of the "loss" of 54 units . . . (160-106) of public housing presumed to occur in the substitution. The site is occupied; the time and money costs of relocation and demolition are considered important constraints.
>
> (c) Site 4, already designated in the WSURA Plan for low-income public housing, is to be developed under co-sponsorship of NYCHA and the New York City Educational Constructional Fund (ECF). Located on a 40,000 [square foot] parcel on the Columbus Avenue block-front between W.96 and W.97 Streets, the planned redevelopment will include a 640-seat elementary school essential to replace obsolescent facilities in the neighborhood, in addition to 270 units of public housing, for which no application has yet been submitted to HUD. Final architectural drawings have already been prepared by NYCHA and ECF, at considerable expense.

HUD assessed the City's evaluation of alternatives and concluded that they were incomplete: They failed to address the possibilities of combining sites, of reparceling sites of dividing the 160 units committed to by HUD onto two of the redevelopment sites, or of seeking additional funds to enable HUD to develop fully a combination of sites. Additionally, HUD concluded that there are two sites which are even more appropriate for the transfer of the proposed 160 units planned for Site 30. The sites HUD proposes in lieu of Site 30 are Site 9, located on the west blockfront of Columbus Avenue between West 95 and West 96 Streets, and Site 41, located on the east blockfront of Columbus Avenue between West 88 and West 89 Streets. These sites are roughly comparable in size to Site 30 and their use as alternatives would entail a minimal amount of underutilization, design change, and site clearance. HUD has some reservations as to the viability of Site 41 as a substitute for Site 30:

> In view of the extensive response to HUD's public notice from residents of W.89 Street and the nature of their comments about low-income and public housing, one might suspect that a proposal to transfer the project to their block might be even more strongly opposed, although it appears to be quite a rational decision, within the context of the Plan and its objectives to facilitate an integrated community.

Study, p. 53.

HUD thoroughly canvasses the persuasive arguments for favoring the two alternatives it suggests. However, it recognizes that the City's reason for opposing them is valid. The added delay of possibly two years strongly militates against the selection of another site.[16] HUD's observation as to the possibility of relocating the low-income housing presently designated for Site 30 is well-stated (Study, p. 54):

> While relocation of the project from Site 30 will certainly reduce the fears and negative perceptions of some WSURA residents, it will certainly increase the fears, hostility and opposition of others if Site 41 is chosen as the alternative. The possibility of new litigation should not be discounted, which would add to the delays. The environmental

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[16] That is the time estimated by City Housing Authority professionals as required for completing the approval process (before construction can start). New borings, new foundation plans and perhaps major design changes might be required. In view of the four years already consumed by the instant litigation, an additional two years of delay in meeting the intense need for low-income housing may properly be treated as an unacceptable environmental effect of the transfer to another site. This is especially cogent as the City Housing Authority estimates that once the injunction over Site 30 is lifted, construction can start in six months (Study, p. 53).

> benefits of transferring the project to Site 41 are considered to be questionable, in view of the apparent spatial distribution of Site 30 opponents. Transfer to Site 9 is less likely to generate the extensive community opposition which would add inestimable time to the mandated delays through redesign and redesignation by appropriate agencies. The environmental benefits of transfer to Site 9 are relatively small and directed at a rather narrow range of beneficiaries (primarily continue and other opponents to Site 30 project). Measured against the environmental costs associated with the minimum two-year delay, the benefits seem insufficient to justify a mandated substitution of sites.

HUD next considers alternative designs (e.g., apartment size distribution and size of project). The City is quoted by HUD as opposing either reducing the size of the project on Site 30 or the apartment sizes which will be offered.[17] HUD concurs, noting that while the project as presently designed may provide more units than are required by the remaining families to be relocated, there appears to be more then enough relocatees residing outside WSURA to fill Site 30 (Study, p. 54). Indeed, the project is actually below the zoned development capacity of the site. HUD concludes (Study, p. 54);

> Further reduction appears unjustified, with no concomitant environmental benefits to be discerned. The objections to reuse of the site for public housing have centered on the character, rather

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[17] "The City rejects these alternatives on the basis of: compatibility of planned project with neighboring development; diseconomies of scale caused by project size reductions; the need to adjust the development potential of other sites 'to conform to the Urban Renewal Plan', and, decidedly more relevant, because the apartment size distribution provides 'a range of apartment sizes that would meet the requirements of the remaining relocation workload.' " Study, p. 54.

> than than [sic] the intensity of use. That character would not be significantly altered if the project were 150 or 120 or 100 units.

HUD adopts the City's proposal that the recreational area of Site 30 be on the southern portion of the site which "not only maximizes its exposure to the sun for the benefit of the residents, but also reduces the amount of plaza and street activity which will occur in the immediate vicinity of the Trinity School." Study, p. 54.

HUD also considered the possibility of dispersing the low-income units on more sites. While this would relieve to a certain extent the concentration of public housing on the West 91st axis mentioned earlier (see Study, p. 40), the environmental detriments are noted. These include little room for outdoor recreational space (though HUD notes this is of little concern as WSURA abounds with such spaces), and scale-related increases in per-unit costs of construction, management and maintenance, which would reduce the number of units the City Housing Authority could afford to build. Finally, HUD notes that dispersal of low-income units may exacerbate the already strained class relations in WSURA (Study, p. 55):

> [By dispersing low-income units, there is] increased potential for inter-group and/or use conflicts, based on the inability to provide adequate buffer space on small mid-block sites to accommodate differing life-styles by the various economic sub-communities.

HUD reviewed the reasons advanced by the City in rejecting the rehabilitation of existing buildings as an alternative to construction of low-income housing on Site 30. The City, HUD concluded, was in error in stating that federal funding would not be available for rehabilitating tenements.[18] Nonetheless, HUD approved the City's decision not to divert the limited funds available from one category of assistance to another category (Study, p. 56):

> [G]iven the tremendous housing need in New York and the finite nature of resources available . . ., City officials decided not to seek Section 8 funds for rehabilitation within WSURA, despite several opportunities to do so, in view of higher priority needs elsewhere in the City. This political decision appears justifiable when viewed within the context of urban environmental factors affecting other and needier neighborhoods especially those which do not have the benefit of either private investment or of a Federal commitment for 160 units of low-rent public housing.

Furthermore, Section 8 housing, which would disperse low-income families as subsidized tenants in privately owned buildings, has little merit when put to large scale use. Secondly, the level of assistance available under Section 8 is less than the rent charged in most privately owned multi-family housing in WSURA. Consequently, Section 8 is not considered feasible for use in WSURA.

Alternative uses for Site 30 were considered by HUD. Included among these were the following potential uses: retail-commercial; office-commercial; public park; public facility; off-street parking. HUD rejected commercial development since "the amount of such space judged to be marketable in this location is far below the development capacity of the site and would cause an unacceptable level of underutilization." Study, p. 57. Because of the abundance of parks in WSURA (it borders Central Park), converting Site 30 to a park would be superfluous. As a park, Site 30's small size (⅔ acre) would invite conflict between those residing on its boundaries and those using it for recreation. Finally, at present, there is only minimal need for an additional public facility in WSURA. This, when combined with the City's inability to fund capital projects of less than urgent need, rules out that option.

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[18] Funding, according to HUD, would be available from the federal government under Section 8 of the Housing Assistance Program (Study, p. 56). See Title 42 of U.S. Code, Sections 1437 *et seq.*, 1437f.

Development of Site 30 as "tax-abated" or "full-taxpaying" housing could be accomplished with only a minor plan change. Though HUD questions the feasibility of erecting a luxury high-rise on Site 30, HUD finds it possible to use Site 30 for low-density, fully taxpaying modern townhouses. However, weighed against this alternative is the heavy environmental cost of failing to meet the continued deficiency of low-income housing in WSURA.

Finally, HUD considers the alternative of no project development on Site 30. This would mean no additional low-income housing in WSURA as the alternatives of different locations, methods and designs were treated by HUD previously. HUD rejects this option (Study, p. 58):

> A decision for government to abandon the objective of providing decent, safe and sanitary housing for low-income persons in the superior urban environment offered in the West Side Urban Renewal Area, absent the assurance of effective means of sheltering such persons in WSURA in private-market housing, would appear to involve a constellation of unacceptable urban environmental impacts including potentially, income and racial segregation.

The need for clean and safe low-income housing is pressing in New York City. When it is juxtaposed against the scarcity of alternative sites for such housing in WSURA, the no-build option would

> unquestionably lead to inter-group tension in the neighborhood which would be a potential adverse

social environmental impact of greater magnitude than the more limited potential adverse effects of public housing construction on Site 30. Study, p. 59

LEGAL DISCUSSION

We find the Clearance and Study submitted by HUD to this Court on April 25, 1977, herein extensively reviewed, satisfies the mandate of the Second Circuit. HUD has considered reasonable alternatives to the development of Site 30 as a 100 percent low-income housing project. It has done this exhaustively using its regulations as guidelines. It has considered alternatives against the full spectrum of urban environmental factors as well as against all the factors the Court of Appeals listed in its opinion.

It is true that in considering alternatives HUD proceeded pursuant to Section 102(2)(C) and not Section 102(2)(D) of NEPA referred to in the mandate of the Court of Appeals in remanding this case back to us.[19] However, this difference is harmless as we do not believe Section 102(2)(D) imposes as intensive or as thorough a consideration of alternatives as that mandated by Section 102(2)(C). To infer otherwise would be contrary to the plain structure and intent of Section 102(2). Section 102(2)(D) is applicable if there are unresolved conflicts concerning alternative uses of available resources. *Trinity v. Romney*, 523 F.2d 88, 93 (2d Cir. 1975); *New York City v. United States*, 337 F.Supp. 150, 159 (E.D.N.Y.1972) (Friendly, J.) Significantly, Section 102(2)(C) is not triggered unless there are proposed "major federal actions significantly affecting the quality of the human environment." *Hanley v. Kleindienst*, 471 F.2d 823 (2d Cir. 1972). It therefore follows that Section 102(2)(D) imposes upon a federal agency the more routine duty of studying, developing and describing alternatives to contemplated actions of the federal government. See 40 C.F.R. §§1500.6, 1500.8 (1976). While both Sections 102(2)(D) and 102(2)(C) implement the Congressional intent behind NEPA "[to require] all federal agencies to consider values of environmental preservation in their spheres of activity,"*Calvert Cliffs' Coordinating Committee v. United States Atomic Energy Commission*, 146 U.S. App.D.C. 33, 35, 449 F.2d 1109, 1111 (1971), the degree of scrutiny necessitated by Section 102(2)(D) is not as intensive or as far-ranging as that under 102(2)(C).

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[19] Section 102(2) reads in pertinent part as follows:

> The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall— . . . (C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly, affecting the quality of the human environment, a detailed statement by the responsible official on— . . . (iii) alternatives to the proposed action . . . (E) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources. . . .

Though plaintiffs knew a few days after October 14, 1975, that HUD was definitely proceeding under Section 102(2)(C) (see oral argument of Eugene Morris, Esq., Official Minutes, October 26, 1977, at p. 40), they apparently were not deeply troubled by this as they failed to formally move this Court for an order requiring HUD to proceed differently. Instead, they were content with writing a letter to the Area Office of HUD to note this discrepancy. If plaintiffs believed then, as they fervently insist now, that HUD's departure from the mandate of the Second Circuit was so material as to utterly negate the purpose of NEPA, they were obligated to promptly bring this matter to our attention. There is no dispute that we had continuing jurisdiction; we could have resolved this problem back then with far less inconvenience and burden upon the litigants and the general public (who, it cannot be denied, have an interest in the prompt resolution of this litigation) than we can at this late date. Notwithstanding, we have examined the merits of plaintiffs' claim. We conclude as we have already stated, that HUD's deviation from the mandate of the Second Circuit was harmless and inconsequential.

Even were Section 102(2)(D) to be interpreted as requiring the federal agency to make as rigorous and detailed an evaluation as that required by Section 102(2)(C), we would find that the Clearance submitted by HUD clearly meets that test—actually exceeds it. See *Monroe County v. Volpe*, 472 F.2d 693, 697 (2d Cir. 1972); *Environmental Defense Fund, Inc. v. Corps of Engineers*, 492 F.2d 1123, 1134 (5th Cir. 1974). Very recently, our Circuit had occasion to set forth the criteria to be employed in reviewing an Environmental Impact Statement prepared pursuant to Section 102(2)(C):

> [In deciding whether an EIS contains] sufficient information to satisfy Section 102(2)(C) of NEPA . . . a court is governed by the "rule of reason," under which an EIS need not be exhaustive to the point of discussing all possible details bearing on the proposed action but will be upheld as adequate if it has been compiled in good faith and sets forth sufficient information to enable the decisionmaker to consider fully the environmental factors involved and to make a reasoned decision after balancing the risks of harm to the environment against the benefits to be derived from the proposed action, as well as to make a reasoned choice between alternatives. *County of Suffolk v. Secretary of the Interior*, Nos. 1187, 1258, 562 F.2d 1368 at 1375 (2d Cir. 1977) (citations omitted).

Thus, as we noted at the inception of this decision, a federal agency cannot satisfy Section 102(2)(C) by a conclusory, superficial consideration of alternatives. The agency must go beyond mere assertions and indicate its basis for them. *I-291 Why? Association v. Burns*, 372 F.Supp. 223 (D.Conn.1974), *aff'd per curiam*, 517 F.2d 1077 (2d Cir. 1975).

In reviewing the Clearance now before us, it is well to remember that the aim of NEPA was not to abolish economic or technical progress but to have federal agencies balance environmental concerns against the material gains of "progress." NEPA requires these agencies to incorporate into their decision-making process a systematic consideration and balancing of these possibly diverse goals. *Calvert Cliffs, supra*, 146 U.S. Appd.D.C. at 36, 449 F.2d at 1112. Furthermore, in remanding the instant case back to us, the Second Circuit clearly enunciated that the solution to unbalanced housing of which plaintiffs complain is not for the courts but for the agencies. *Trinity, supra*, 523 F.2d at 95. In reviewing the adequacy of HUD's consideration of alternatives, we have been mindful of these constraints and have endeavored to avoid substituting what we may prefer for what the duly authorized agencies have resolved for Site 30 after good faith deliberation.

We find the consideration by Clearance of alternatives a very illuminating and factual discussion of all appropriate options to construction of 100 percent low-income housing on Site 30. Indeed, it would be on the merits to describe it as an exhaustive study. We find that HUD discharged its duty to examine alternatives with good faith objectivity. HUD did not generate a mountain of paper to rationalize a prejudgment to which it had committed itself.

In judging whether HUD acted in good faith, we cannot apply the requirements of NEPA retroactively *Environmental Defense Fund, Inc. v. Corps of Engineers*, 492 F.2d 1123, 1129 (5th Cir. 1974). Thus, HUD was obligated to consider as relevant factors the present condition of Site 30 as well as the several years it will take to prepare possible alternative sites. In reviewing HUD's weighing of the advantages and disadvantages of the appropriate alternatives, we will not turn the clock back and compel the agency to disregard present realities or require HUD to pivot its decision on facts that no longer exist *New York City v. United States, supra,* at 163. As we stated earlier, we are not going to "second guess" HUD as to the substantive merits or demerits of a particular alternative. Those decisions are, by Congress, committed to the good faith decision of the agency. *Hanley v. Mitchell,* 460 F.2d 640, 643 (2d Cir. 1972); *Converned About Trident v. Schlesinger,* 400 F.Supp. 454, 480 (D.Wash. 1975); *Environmental Defense Fund v. Froehlke,* 473 F.2d 346, 353 (8th Cir. 1972). The wisdom of low-income housing, its siting in WSURA, its design, or finally the decision, after a good faith consideration by HUD of alternatives pursuant to Section 102(2)(D) of NEPA, to locate it on Site 30 are not before us for review. The limited issue before us is whether the mandate of the Court of Appeals has been satisfied—has HUD fulfilled its obligations under Section 102(2)(D). *Trinity, supra,* 523 F.2d at 95.

Consequently, our focus in reviewing the Clearance is on the process HUD employed in arriving at the conclusions which formed the basis of its decision to construct low-income housing on Site 30 rather than on another appropriate site. The issue, therefore, is whether HUD's decision was made in good faith or whether it was arbitrary, capricious, or otherwise not in accordance with the law. *Concerned About Trident, supra,* at 481.

We find that HUD's consideration of alternatives was neither arbitrary nor capricious. It was done in good faith and in full accordance with the law. See Section 706(2)(A) of the Administrative Procedure Act; *Citizens to Preserve Overton Park v. Volpe,* 401 U.S. 402, 413–416, 91 S.Ct 814, 28 L.Ed.2d 136 (1971). HUD's decision was based upon a consideration of all relevant factors, to wit, site selection and design, density, displacement and relocation of residents, quality of the built environment, impact of the environment on the current residents and their activities, decay and blight, implications for the city growth policy, traffic and parking noise, neighborhood stability, and the existence of services and commercial enterprises to service the new residents. *Trinity, supra,* 523 F.2d at 93.

HUD weighed the technical and economic advantages and disadvantages of building or not building on Site 30 together with the environmental costs and benefits flowing therefrom. HUD gave careful and detailed attention to all the environmental factors contemplated as relevant under NEPA. The agency is not expected to arrive at a perfect solution of all environmental consequences of a proposed Federal project. *County of Suffolk, supra.* at 1378; *Natural Resources Defense Council v. Callaway,* 524 F.2d 79, 88 (2d Cir. 1975). We cannot disturb HUD's finding or rejection of alternatives as long as HUD's choice among them was reasoned. *County of Suffolk, supra,* at 1387.

Only by a preponderance of the evidence can plaintiffs establish their claim that the considreation by HUD of alternatives was inadequate; *a prima facie* showing of deficiencies will not suffice. *Sierra Club v. Morton,* 510 F.2d 813, 818 (5th Cir. 1975); *Sierra Club v. Callaway,* 499 F.2d 982, 992 (5th Cir. 1974); *Environmental Defense Fund, Inc., supra,* at 1131.

Plaintiffs offer no feasible alternative to construction of low-income housing on Site 30 in WSURA which will lessen the environmental impact while providing the type and quantity of housing so urgently needed. We sympathize with plaintiffs' professed fear of crime. However, plaintiffs fail to causally link crime with the presence of low-income housing. It is beyond this Court's ken to single out the reason or reasons for the sustained increase in the crime rate in WSURA over the past decade; it is apparent that soaring crime rates are not confined to the urban ghettos but, sorrowfully, afflict many areas of this country where there is no low-income housing.[20] Thus, we cannot accept the proposition that the people who dwell within low-income housing bring about crime to a greater degree than do those making up other strata of society.

Yet, even were plaintiffs' theory considered valid, we do not see how shifting low-income housing around the 20 block area of WSURA would significantly reduce the crime plaintiffs fear. Alternatives which result in similar or greater harm need not be considered. *Sierra Club v. Morton, supra,* at 825.

Furthermore, plaintiffs are decidely wrong when they assert that HUD omitted from its Clearance all information contrary to the desirability of adding an additional 160 units of low-income housing (Affidavit of Eugene J. Morris sworn to October 24, 1977, at p. 15). HUD fully analyzed the public comment it received, both adverse and favorable, to proceeding with construction on Site 30. HUD was open and frank in revealing all the drawbacks to going ahead with low-income housing on Site 30. Plaintiffs have not brought to our attention any negative factor not considered by HUD.

The plaintiffs fail to see, or will not see, that these drawbacks are not peculiar to Site 30 but are common to WSURA and possibly to the siting of low-income housing anywhere in New York City, with the possible exception of limited areas in Staten Island or Brooklyn. Plaintiffs do not set forth substantive or dependable alternatives to show HUD's failure to consider alternatives; we consequently reject plaintiffs' argument to

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[20] The 1976 Statistical Abstract of the United States, published by the Bureau of the Census, U.S. Department of Commerce, states that for cities with populations of under 10,000, the annual percent change of rates for violent crime is as follows:

1965 to 1969	1970 to 1974	1974 to 1975
7.9	11.8	6.3

In cities with populations of 250,000 or more, the percent change for the comparable period is 20.5, 3.3, and 4.6.

that end. *Upper West Fork v. Corps of Engineers*, 414 F.Supp. 908, 922 (N.D.W.Va.1976).

HUD was not required to hold public hearings prior to preparing the Clearance in which it evaluated the several alternatives to construction on Site 30. In remanding this case back to us, the Second Circuit did not specify that a public hearing would be required under HUD's obligation to consider alternatives pursuant to Section 102(2)(D) of NEPA. It goes without saying that we would have held one if it had been warranted. The Council on Environmental Quality, the federal agency charged with appraising programs and activities of the federal government in light of NEPA, Section 4342 of Title 42, U.S. Code, has set forth criteria for determining whether a public hearing is appropriate:

> (1) The magnitude of the proposal in terms of economic costs, the geographic area involved, and the uniqueness or size of commitment of the resources involved;
> (2) The degree of interest in the proposal, as evidenced by requests from the public and from Federal, State and local authorities that a hearing be held;
> (3) The complexity of the issue and the likelihood that information will be presented at the hearing which will be of assistance to the agency in fulfilling its responsibilities under the Act; and
> (4) The extent to which public involvement already has been achieved through other means, such as earlier public hearings, meetings with citizen representatives, and/or written comments on the proposed action.[21]

As hereinabove set forth, HUD solicited comments from the public through a written advertisement that appeared in the October 28, 1975 edition of The New York Times. The comments received were extensively and thoroughly analyzed and, where possible, incorporated into the Clearance. See, e.g., pp. 25, 30. See also Affidavit of Stanley Speirs sworn to November 9, 1977, at pp. 2-3.

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[21] 40 C.F.R. § 1500.7 (1976). While these regulations are applicable to the preparation of an EIS under Section 102(2)(C), the decision as to hold or not to hold a public hearing under Section 102(2)(D) would involve the same considerations.

Furthermore, and this Court well remembers this, public involvement in the decision to place low-income housing was substantially achieved when this matter was originally tried before us over a period of thirty full trial days which resulted in a record of 13 large volumes. A considerable portion of the case at that time relied upon a factual presentation which was reexamined and weighed again by HUD and considered by it in the preparation of the Clearance now before us. Indeed, significant portions of the instant Clearance make reference to the proceedings which were held before us (e.g. Neighborhood Character, pp. 12–20, and Police Protection, p. 48). Neither NEPA nor any other federal statute mandates that a public hearing automatically be held for the preparation of a report pursuant to Section 102(2)(D) of NEPA. See *Hanley v. Kleindienst*, 471 F.2d 823, 835 (2d Cir. 1972). We are firm in our belief that a public hearing would not have developed relevant information any more fully and effectively than what stands before us now. If we had looked upon it otherwise, we would have been duty-bound to have ordered a hearing.

Secondly, as the proposed conversion of Site 30 to wholly low-income housing was first made in 1971, *Trinity, supra*, 387 F.Supp. at 1057, and as it is a proposal now well-known, indeed intimately known to the residents of WSURA, another hearing would not have meaningfully broadened public knowledge about this project. The words of *Hanley v. Kleindienst, supra*, are germane:

> The precise procedural steps to be adopted are better left to the agency, which should be in a better position than the court to determine whether solu-

> tion of the problems faced with respect to a specific major federal action can better be achieved through a hearing or by informal acceptance of relevant data. 471 F.2d at 836.

While the issue in *Hanley, supra,* was the threshold determination of whether to prepare an EIS pursuant to Section 102(2)(C), we consider that the holding by our Court of Appeals in *Hanley* vests agencies with a limited discretion as to whether to hold a public hearing. Given the numerous and extensive opportunites the plaintiffs and the public have had to bring facts and arguments to the attention of HUD, we most emphatically cannot say that HUD abused its discretion by declining to hold a public hearing on the question of alternatives.

We also find that the Clearance prepared by HUD did not "rubber stamp" the Environmental Review prepared by the City of New York. It is well-settled law in environmental litigation that a federal agency may adopt the work of a state or local government after reviewing it as long as the federal officials have exercised their own independent judgment. This the federal agencies clearly have done. *East 63rd Street Association v. Coleman,* 414 F.Supp. 1318, 1328 (S.D.N.Y. 1976); *Conservation Society of Southern Vermont, Inc. v. Secretary of Transportation,* 508 F.2d 927, 931-932 (2d Cir. 1974); *Finnish Allatoona's v. Volpe,* 355 F.Supp. 933 (N.D. Ga. 1973); *Citizens Environmental Council v. Volpe,* 484 F.2d 870, 872 (10th Cir. 1973). See 38 Fed. Reg. 10865 which permits the use, after review, of initial information furnished by an applicant in the form of an EIS.

We are satisfied that HUD maintained a vigorously independent stance; it actively sought out facts and additional alternatives the City failed or neglected to consider. See Study, pp. 51-54. HUD in no way abdicated its responsibility under NEPA to consider all appropriate alternatives to the fullest extent possible. See

Green County Planning Board v. Federal Power Commission, 455 F.2d 412, 420 (2d Cir. 1972). We find that HUD has satisfied the "authorship" requirements of NEPA.

Among the points urged by the plaintiffs is the City's alleged failure to comply with the recently enacted State Environmental Quality Review Act (Section 8-0113(3) of the New York State Environmental Law) as it affects construction in New York City. See Executive Order No. 91 issued by the Mayor of the City of New York, August 24, 1977. We find that the proposed low-income project planned for Site 30 is exempt under the terms of the Mayor's Order from filing any application thereunder as the instant project was undertaken prior to June 1, 1977. Section 4(a)(2)(i) of the aforementioned Executive Order.

The remaining points urged by plaintiffs lack merit.

The Government's motion to dissolve our Order of September 25, 1975 is granted inasmuch as it is our firm opinion that the mandate of the Court of Appeals for the Second Circuit, *Trinity et al. v. Romney et al.*, 523 F.2d 88, 95 (decided July 24, 1975), has been satisfied. Since there is no genuine issue remaining with respect to any material fact, and because defendants are entitled to judgment in their favor as a matter of law, the plaintiff's complaint is dismissed. Settle order on notice.

APPENDIX C

UNITED STATES COURT OF APPEALS

For the Second Circuit

Nos. 840, 902—September Term, 1974.

(Argued March 10, 1975 Decided July 24, 1975.)

Docket Nos. 75-7061, 7092

Trinity Episcopal School Corporation
and Trinity Housing Company, Inc.,

Plaintiffs-Appellants,

Roland H. Karlen, Alvin C. Hudgins
and CONTINUE,

Intervening Plaintiffs-Appellants,

v.

George Romney, Secretary of Dept. of Housing and Urban Development, S. William Green, Regional Administrator, Dept. of Housing and Urban Development, U.S. Dept. of Housing and Urban Development, Charles Urstadt, Commissioner of Housing and Community Renewal, N.Y. State Division of Housing and Community Renewal, The State of New York, John V. Linsay, Albert A.

WALSH, HOUSING AND DEVELOPMENT ADMINISTRATION OF THE CITY OF NEW YORK, THE CITY PLANNING COMMISSION OF THE CITY OF NEW YORK, DONALD H. ELLIOTT, WALTER MCQUADE, IVAN MICHAEL, GERALD L. COLEMAN, CHESTER RAPKIN, MARTIN GALLENT, ABRAHAM D. BEAME, SANFORD D. GARELIK, PERCY E. SUTTON, ROBERT ABRAMS, SEBASTIAN LEONE, SIDNEY LEVISS, ROBERT T. CONNER AND THE CITY OF NEW YORK,

Defendants-Appellees,

STRYKER'S BAY NEIGHBORHOOD COUNCIL INC.,

Intervening Defendant-Appellee.

Before:

MOORE, MANSFIELD, and GURFEIN,

Circuit Judges.

MOORE, *Circuit Judge:*

The plaintiffs Trinity Episcopal School Corporation (Trinity) and Trinity Housing Company, Inc. together with Intervening-Plaintiffs Roland H. Harlen, Alvin C. Hudgins and CONTINUE (Committee Of Neighbors To Insure a Normal Urban Environment) appeal from judgments in favor of defendants, who for purposes of brevity may be stated as the United States Department of Housing and Urban Development (HUD), its Secretary, the Regional Administrator of HUD, the New York State Division of Housing and Community Renewal and its Commissioner, the Mayor of New York, the City Planning Commission, various City officials and the City of New York (City). Stryker's Bay Neighborhood Council, Inc. is an Intervening Defendant-Appellee.

Trinity (non-sectarian and inter-racial) is an elementary and secondary educational institution (grades 1 through 12) founded in 1709 and presently located between West 91st Street and West 92nd Street and between Amsterdam and Columbus Avenues in New York City. Prior to 1962 because of the deteriorated state of the area Trinity claims that it was considering moving its facilities outside of the City of New York.

Trinity argues that, relying upon representations of the City and Upon the West Side Urban Renewal Plan (the Plan) promulgated by City and State agencies to rehabilitate a designated twenty-block area,[1] Trinity abandoned its plans to move and instead agreed, together with Trinity Housing, to become a sponsor of Site 24[2] in the renewal area to develop additional school facilities and housing. The school addition was to be financed by Trinity and the housing was to be a "middle-income" project under the Mitchell-Lama Law. (McKinney's, New York Private Housing Finance Law. Con. Laws, Vol. 41.)

Trinity asserts that it was induced to "sponsor" Site 24 upon representations of certain government officials that the Area would be developed to include at most 2,500 units of low-income housing and that in the middle-income buildings there would be 30% low-income and 70% middle-income housing units.[3]

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[1] The area embraced by the Plan extends from 87th Street to 97th Street and from Central Park West to Amsterdam Avenue (the Area).

[2] Site 24 is immediately adjacent to the existing school on the west side of Columbus Avenue between 91st and 92nd Streets.

[3] The contract between Trinity and the City for Trinity's development of Site 24 provided for occupancy on this basis.

The intervening plaintiffs assert that they purchased their brownstone dwellings and rehabilitated them relying upon similar City representations as to income mix of the area.

The focal point of this controversy is Site 30, originally designated for middle-income housing, which has been chahe defendants to low-income housing containing 160 units.[4] The plaintiffs would have the court reinstate Site 30 as a middle-income project and enjoin both construction thereon as low-income housing and the use of federal funds therefor. The reasons assigned for court interference may be summarily condensed as follows:

I. Breach of Contract by defendants failing to live up to their representations.

II. Failure by the defendants to conform to the purposes and intent of the Plan to establish an integrated community in the Area.

III. Establishment of a "pocket ghetto" of a non-integrated nature (namely, a concentration of low-income housing) in Trinity's immediate area; and

IV. Lack of compliance by HUD with essential requirements and conditions of the National Environmental Policy Act (NEPA).

Defendants contend that the 2,500 figure for low-income housing represented merely an estimate or goal and further emphasize that the contract and Plan authorized the City to make changes in the Plan as development progressed. They argue that the change of Site 30 from middle-income to low-income housing was necessitated by the need to relocate persons removed from the Area during renewal and rehabilitation as well as by the general housing needs of low-income residents of Manhattan. Finally they argue that HUD was not required to consider any alternatives to low-income housing on Site 30 because the project will not significantly affect the environment and because there are no unresolved conflicts concerning the use of alternative resources.

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[4] Site 24 was also changed from middle- to low-income housing but there are no funds available to proceed with development of this parcel.

The trial court gave the most meticulous attention to the many issues involved, most of which were factual. Twenty-five days of non-jury trial over a period of eight months, hundreds of exhibits, hundreds of pages of affidavits and testimony, all have resulted in a record of 13 large volumes, which together with briefs have been presented to us for our appellate consideration. The facts and the law have been set forth in an opinion by the trial judge of 41 pages which bespeaks the careful consideration which he gave to the case.[5] In commencing appellate review we can well use a prologue the trial judge's epilogue:

"This case has troubled us greatly. The goal of a racially, ethnically, and economically integrated community is sought by many, but the road to achieving it is protracted and ofttimes perilous, a course frequently encountered where objectives are laudatory. The hopes, fears and needs of different classes and races must somehow be reconciled if urban peace is to be attained." (387 F.Supp. at 1085.) This goal was obviously the intention of the Congress and the Plan. Equally obvious was it the goal in the minds of the plaintiffs when they agreed to participate in the Plan. In their opinions the deviation has been so drastic as to call for the relief which they seek.

I.

It would be pointless to reanalyze the factual background so thoroughly and ably covered in the trial court's opinion. Basic to plaintiffs' position is their claim of breach of contract. However, before entering into the contract Trinity knew that the Plan had previously undergone four revisions and that these revisions had materially altered the original concepts as to the low-income, middle-income ratios. Furthermore, the contract itself specifically authorized modification and amendment by the City.[6] In view of this express provision, an implied provision to the contrary would not be warranted. The trial court properly held that the changes in the number of low-income units and the ratios between low and middle did not constitute a breach of contract.

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[5] *Trinity Episcopal School Corporation* v. *Romney*, 387 F.Supp. 1044 S.D.N.Y. 1974).

With respect to the contention that the defendants' failure to adhere to a maximum number of 2,500 low-income units and a 70 to 30 percent ratio of middle to low income housing violates the purposes and intent of the Plan, the evidence regarding the extent of crime and social problems associated with "ghettoization" was conflicting. Furthermore, we cannot label as clearly erroneous the District Court's conclusion that existing or threatened community problems or deterioration are not attributable to an increase in the number of low income families in the community rather than to other causes.

II.

Plaintiffs, relying on our decision in *Otero* v. *New York City Housing Authority*, 484 F.2d 1122 (1973), argue that the conversion of Site 30 from middle- to low-income housing will cause a concentration of three public housing projects on 91st Street—the Trinity block—and that a "pocket ghetto" is thereby created in that area. The trial judge concluded "for the purposes of this litigation that the tipping point of a community is that point at which a set of conditions has been created that will lead to the rapid flight of an existing majority class under circumstances of instability which result in the deterioration of the neighborhood environment." (387 F.Supp. at 1065–1066). To determine whether an area has reached that point he specified three criteria: (1) gross numbers of minority or measurable economic or social group families likely to affect adversely Area conditions; (2) the quality of community services and facilities; and (3) the attitudes of majority group residents. As to (1) the court found that plaintiffs had shown "nothing to rebut the conclusion that the Area is both racially and economically sound." As to (2) the court found that the crime and vandalism in the Area was localized within three controversial buildings and concluded that despite "substantial testimony of numerous deplorable antisocial acts within the Area, the totality thereof does not depict a general deteriorating condition." As to (3) "Community Attitudes" the court believed that "where, in light of the lack of alternative decent low-income housing, a tipping analysis may mean an outright denial of housing to persons on the basis of racial or economic classifications, such analysis must focus particularly upon objective and measurable criteria . . . " (387) F.Supp. at 1072). Accordingly, the court concluded that "plaintiffs have not shown convincing evidence that the Area is in danger of tipping or that construction of public housing on Site 30 would cause tipping." (387 F.Supp. at 1073).

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[6] Section F of the 1966 Fourth Revision of the Plan, which was annexed to and incorporated into Trinity's contract with the City, specifically authorized modification and amendment.

Thus far we have considered the trial court's conclusions based on facts presented by both groups, plaintiffs and defendants, and, although there may have been room for differences of opinion, we cannot accept plaintiffs' arguments that the Court's conclusions are clearly erroneous.

III.

There remains, however, an important point of law raised by plaintiffs, namely, that the agencies in question have failed to comply with the requirements of the National Environmental Policy Act of 1969, 42 U.S.C. §§4321 *et seq.* (NEPA), in considering whether to award federal funds for development and use of Site 30 as public housing according to the redesignation. More specifically the question is whether the processing of the Special Environmental Clearance[7] by HUD which resulted in the conclusion that the public housing project on Site 30 would not have a significant adverse impact on the environment was conducted in compliance with the procedural and substantive mandates of NEPA and HUD's own guidelines.

The lower court found 1) that consideration of alternatives is necessary only in the context of an EIS and 2) that HUD acceptance of the conclusion of the Housing Authority that, considering the scarcity of available sites and the unmet needs for public housing, there are no alternative sites, fulfilled HUD's duty to consider alternatives. (387 F.Supp. at 1082). We hold that these two conclusions as a matter of law fail properly to articulate or scrutinize HUD's responsibilities as mandated by NEPA. We believe that HUD failed to comply with the mandate of §102 (2)(D)[8] of the Act and that compliance therewith is a prerequisite to any further federal action on the Site 30 project.

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[7] HUD has adopted a three-level approach to compliance with NEPA consisting of: 1) Normal Environmental Clearance; 2) Special Environmental Clearance; and 3) Environmental Impact Statement *HUD Handbook 1390.1*, 38 Fed. Reg. 19182 (July 18, 1973). These three levels represent increasingly detailed or stringent review with only the third level involving formal review by other agencies. This structure recognizes that federal agencies are responsible for consideration of environmental factors whether or not an environmental impact statement is required. HUD's regulations provide that under certain circumstances level 2 is the primary environmental review and in this case the project is in the category where a Special Environmental Clearance is mandated by HUD regulations since it is a housing project with more than 100 units.

[8] 42 U.S.C. §4332(2) provides as follows:

"... all agencies of the Federal government shall ...

Federal agencies must consider alternatives under §102 (2)(D) of NEPA without regard to the filing of an EIS and this obligation is phrased to encompass a broad type of consideration—"study, develop, and describe." In *Monroe County Conservation Council, Inc.* v. *Volpe*, 472 F.2d 693 at 697 (2d Cir. 1972), this Court emphasized the importance of consideration of alternatives under §102(2)(D). The statute states in broad language that alternatives must be considered with respect to "any proposal which involves unresolved conflicts concerning alternative uses of available resources." Although this language might conceivably encompass an almost limitless range, we need not define its outer limits, since we are satisfied that where (as here) the objective of a major federal project can be achieved in one of two or more ways that will have differing impacts on the environment, the responsible agent is required to study, develop and describe each alternative for appropriate consideration. *Cf. Hanly* v. *Kleindienst*, 471 F.2d at 835 (2d Cir. 1972).

The Fourth Circuit recently considered the mandate of §102(2)(D) and we agree that this section requires thorough agency action:

> Clearly, Section 102(2)(D) is supplemental to and more extensive in its commands than the requirement of 102(2)(C) (iii). It was intended to emphasize an important part of NEPA's theme that all change was not progress and to insist that no major federal project should be undertaken without intense consideration of other more ecologically sound courses of action, including shelving the entire project, or of accomplishing the same result by

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(D) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources . . ."

> entirely different means. In *Natural Resources Defense Council, Inc.* v. *Morton*, supra, the District of Columbia Circuit recognized that this section did not intend to limit an agency to consideration of only those alternatives that it could adopt or put into effect. We agree. The imperative directive is a thorough consideration of all appropriate methods of accomplishing the aim of the action, including those without the area of the agency's expertise and regulatory control as well as those within it.

Environmental Defense Fund, Inc. v. *Corps of Engineers*, 492 F.2d 1123 at 1135 (4th Cir. 1974).

We have recognized in this Circuit that NEPA's review encompasses in the urban setting the quality of urban life.

> The National Environmental Policy Act contains no exhaustive list of so-called environmental considerations but without question its aims extend beyond water and air pollution. (Citations omitted). The Act must be construed to include protection of the quality of life of city residents. Noise, traffic, overburdened mass transportation systems, crime, congestion, and even availability of drugs all affect the urban "environment" and are surely results of the "profound influences of . . . high density urbanization and industrial expansion."

See Hanly v. *Mitchell*, 460 F.2d 640 (2d Cir. 1972); *Hanly* v. *Kleindienst*, 471 F.2d 823 (2d Cir. 1972).

The case law, the guidelines of the Council on Environmental Quality, 36 Fed. Reg. 7724 (1971), and the regulations of HUD, 37 Fed. Reg. 22673 (1972) and 38 Fed. Reg. 19182 (1973), themselves indicate that federal agencies must consider the following urban factors in a project like the one at hand: site selection and design; density; displacement and relocation; quality of the built environment; impact of the environment on current residents and their activities; decay and blight;

implications for the city growth policy; traffic and parking; noise; neighborhood stability; and the existence of services and commercial enterprises to service the new residents. It is against this background of urban environmental factors that HUD was required by its own regulations and by the legislation as well to consider a variety of alternatives such as: alternative locations or sites; alternative of not building; alternative designs both in use of site and in size of individual units and number of total units; dispersal of the low income units on more sites in the project area; alternative measures for compensating or mitigating environmental impacts; and alternatives requiring action of a significantly different nature which would provide similar benefits with different impacts such as rehabilitation of existing buildings in the Area as public housing projects. *See, e.g.*, 40 CFR §1500 *et seq.*

HUD, despite noting that there was considerable organized opposition to the project motivated by alleged social impacts, concluded that these "impacts are not environmental impacts within the context of Section 101(b) of NEPA".

The only statement of HUD in the Special Environmental Clearance dealing with alternatives simply adopts the conclusion of the New York City Housing Authority that there are no alternative site locations because of the scarcity of land. This blanket generalization unsupported by the evidence as to alternative sites within the area (not to mention other potential sites) does not conform with HUD's responsibilities. HUD is not required to search out potential sites throughout the New York metropolitan area but the federal agency must itself determine what is reasonably available especially where as here the building of public housing is part of a coordinated plan to deal with the broad problem of meeting the housing needs of low income residents.

In *Greene County Planning Board* v. *F.P.C.*, 455 F.2d 412 (2d Cir.), 409 U.S. 849 (1972), *cert. denied*, (cite) we noted the danger of accepting without question the self-serving statements or assumptions of local agencies in connection with the preparation of EIS's. This danger is equally apparent where an agency like HUD accepts an unsupported statement as to lack of any alternatives from "interested" local agencies. Furthermore in the context of legislation that requires federal agencies to affirmatively develop a reviewable environmental record, even where the agency determines that an EIS is not required, a perfunctory and conclusory statement that there are no alternatives does not meet the agency's statutory obligation. *See Hanly* v. *Mitchell, supra*, 460 F.2d at 647.

HUD's emphasis on "the unmet needs for public housing" rather indicates that any search for, or investigation of, alternatives was either highly limited or non-existent. The statement of possible alternatives, the consequences thereof and the facts and reasons for and against is HUD's task. Such a statement should be made, not as HUD's concept or the Housing Authority's view as to how these agencies would choose to resolve the city's low income group housing situation, but as to how within the framework of the Plan its objective of economic integration can best be achieved with a minimum of adverse environmental impact. In this endeavor consideration might well be given to the entire West Side Urban Renewal Area, the percentage of low-income units in that particular location, the sizes, type and designs of existing and possible alternative housing, whether there may be ways of spreading low-income units throughout the area rather than concentrating them in a few plots such as Site 30, and whether rehabilitation of existing housing may be developed as a means of achieving the Plan's contemplated economic ratio. Those who live there and those who hope to live there are entitled to obtain their housing aided by federal funds in a balanced and integrated community as envisaged by the Plan. Nor is it sufficient to approach the problem on an Area-wide basis. The purpose of the Plan is integration—not concentration. That purpose would not be achieved by concentrating low-income housing on 91st Street and compensating for this segregation by an equal concentration of middle-income housing on 97th Street.

The unbalanced housing of which plaintiffs complain should be capable of a fair solution. As previously stated, solution is not for the courts but for the agencies. These very agencies seem to have been successful in the past. It may well be that the present imbalance is caused by an excessive desire to aid the low-income group and for this not unpraiseworthy motive to ignore the mandates of the Plan. However, it is not for courts or agencies to legislate. The very requirement of NEPA to seek "alternatives" was intended to have a salutory effect. If attention is paid to the Plan and its purposes, the agencies with the cooperation of the interested parties should be able to arrive at an equitable solution. This result is best accomplished by remanding the case to the District Court to require a study by the appropriate agencies of possible "alternatives" with respect to the present proposal to change the development of Site 30 to 100 per cent low-income housing.

It may be that the factors which caused the trial court to list fifteen categories in which there was "convincing testimony by Area residents on these reprehensible[9] conditions" might well influence the appropriate housing agency to endeavor to minimize these dangers in its "alternatives" recommendations.

We agree with the trial court that an environmental impact statement is not required for the Area as a whole. Each section will have its own individual problems.

Lastly, we turn to appellants' argument that the District Court's decision should also be reversed because of the City of New York's failure to comply with §514 of the General Municipal Law, which requires the City to file with the State Commissioner of Housing and Community Renewal a copy of each proposed urban renewal program or change in such program and obtain the Commissioner's approval, including his criticism and suggestions, before putting the program into effect. In the present case the City failed to comply literally with this requirement. However, as Judge Cooper pointed out, the incumbent Commissioner testified that he would have supported the proposed conversion of Sites 24 and 30. Although such a *nunc pro tunc* approval is hardly to be encouraged as a model procedure we believe that, since §514 does not require the Commissioner to hold a hearing, his testimony amounted to substantial compliance with the statutory requirement and a remand for the purpose of following the strict procedure of the statute would not serve any useful purpose in the present case.

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[9] Crime, drugs, vandalism, etc.

We find that HUD's acceptance of the "no alternatives" conclusion as a matter of law fails to meet the directive of 102(2)(D) of NEPA. We remand so that the District Court can fashion an appropriate order requiring HUD to consider reasonable alternatives to the development of Site 30 as a 100 per cent low-income housing project to the fullest extent possible using HUD regulations as guidelines for the type of alternatives and the context of urban environmental factors to be used in the process of consideration of alternatives, consistent with the scheme of the Plan.

APPENDIX D

TRINITY EPISCOPAL SCHOOL CORPORATION AND
TRINITY HOUSING COMPANY, INC., PLAINTIFFS,

V.

GEORGE ROMNEY SECRETARY OF THE DEPARTMENT OF
HOUSING AND URBAN DEVELOPMENT, ET AL.,
DEFENDANTS,

V.

STRYCKER'S BAY NEIGHBORHOOD COUNCIL, INC.,
INTERVENING DEFENDANT,

v.

ROLAND H. KARLEN ET AL. INTERVENING
PLAINTIFFS. No. 71 Civ. 4315 (IBC).

United States District Court,
S.D. New York.
Nov. 15 1974

OPINION

IRVING BEN COOPER, District Judge.

INTRODUCTION

This is a case directly affecting the future of a 20 square block community and its more than 35,000 current and former residents. The area is the West Side Urban Renewal Area ("Area") in Manhattan, New

York City, north between 87th and 97th Streets, west between Central Park West and Amsterdam Avenue.[1] The West Side Urban Renewal Plan ("Plan" or "Final Plan") governs housing construction in the Area and was intended to bring about the rehabilitation and renewal of the Area; certain changes in the Plan would permit the construction of more low income housing and the admission of more low income occupants into existing buildings in the Area. The action before us is to enjoin these changes,[2] and plaintiffs seek an order directing that future development proceed in a manner consistent with the Plan.

Plaintiffs are a private school within the Area and a group of middle income residents, primarily brownstone home owners; they claim that these changes would violate the Plan upon which they relied in choosing their homes, and further, that such changes would cause the Area to deteriorate and become a ghetto. Defendants are the United States Government, the State of New York, the City of New York, and a community group of

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[1] Following the body of this opinion is Appendix A, a map of the Area (admitted into evidence as Ex. 14A) showing site locations and use designations as of March 1966 (the most recent map admitted into evidence).

[2] Plaintiffs Trinity Episcopal School Corporation and Trinity Housing Company, Inc. ("Trinity"), occupant of Site 24 within the Area, instituted this action on October 4, 1971, against the named defendants except Strycker's Bay Neighborhood Council ("Strycker's Bay"). Answers were filed by the City of New York ("City") and by the United States Attorney on behalf of the Department of Housing and Urban Development ("HUD") and by the State of New York ("State"). Thereafter, on April 13, 1972, Strycker's Bay, a public interest group of residents and community organizations from the Area, joined as intervenor-defendant. Only July 18, 1973, Roland N. Karlen and Alvin C. Hudgins, residents of the Area, and CONTINUE (Committee of Neighbors To Insure a Normal Urban Environment), another community group representing Area residents, moved to join as intervenor-plaintiffs. Their motion was granted on April 22, 1974 during trial.

Area residents; their position is that these changes are necessary to provide sufficient housing to former Area residents who were displaced by the impact of urban renewal and who therefore have a right of return to the site of their homes. Defendants further contend that the proposed changes would not adversely affect the Area.[3]

The jurisdiction of this Court is invoked under the Fifth and Fourteenth Amendments of the United States Constitution and under 28 U.S.C. §§ 1331, 1343 and 2201.

It has been clear from the outset that the parties to this controversy represent not only themselves but also the interests of thousands of citizens from divergent economic and racial backgrounds with inevitably conflicting needs and demands. In large measure our decision herein is our effort to find a just resolution of these conflicts.

ISSUES

The four issues agreed to by counsel at trial[4] (Tr. 48–52) are as follows:

(1) Whether there has been a breach of contract between Trinity, as sponsor of Site 24, and the City by reason of changes in the Area after execution of their

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[3] Plaintiffs ask, in substance, that this Court (1) enjoin the construction of public housing on Sites 4 and 30 within the Area and reinstate their use designation as middle income housing; (2) direct that squatters (defined hereinafter) be removed from the Area; and (3) direct that new middle income buildings observe a housing ratio of 70% middle income to 30% low income, claimed to be a provision of the Plan.

[4] Plaintiffs made a post-trial motion for counsel fees regardless of the outcome of this action. We will deal therewith at a later time.

contract and the manner in which the City has proceeded with execution of the Plan;[5]

(2) Whether the City was required to secure the written consent of plaintiffs Karlen and Hudgins as residents of the Pilot Project Area and based upon their contracts with the City to any proposed change in the Plan and particularly to the conversion of Site 30 from middle income to public housing;

(3) Whether construction of a public housing project on Site 30 would cause the Area to "tip" within the meaning of Otero v. New York City Housing Authority, 484 F.2d 1122 (2d Cir. 1973) *("Otero")*;

(4) Whether the Department of Housing and Urban Development ("HUD") has complied with the National Environmental Protection Act ("NEPA"), 42 U.S.C. §§ 4321–4347, regarding its study approving construction of the public housing project on Site 30.

Finally, plaintiffs raised in their post-trial memoranda an additional issue as to whether the approval by the City of the conversion of Sites 4 and 30 from middle income to public housing was in compliance with the statutory procedures.

A motion for a preliminary injunction was made on July 18, 1973; on September 19, 1973, it was referred to this Court for an evidentiary hearing. During the course of the hearing the motion for a preliminary injunction was withdrawn and the hearing converted to full trial on the merits. Trial proceeded on that basis with a long interruption from October 11, 1973 to April 22, 1974 devoted to a series of conferences looking to a settlement embracing a formula acceptable to all parties. There were periods of great expectation accompanied sometimes by sudden, hopeful ascents only to be followed ultimately by a sharp decline clearly pointing to a trial as the only course for the resolution of a perplexing situation fraught with perilous overtones. After 30 full trial days, the trial was concluded on May 20, 1974. Final supplemental post-trial memoranda were received on July 19, 1974.

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[5] A site sponsor is any person, group of persons or corporation who desires to build, manage or own a particular site within the Area, after entering into a contract with the City regarding that site.

I. HISTORY OF THE PLAN

Underlying the allegations of the parties is a conflicting understanding of the Plan, its purpose, and the scope of its commitments. We therefore undertake to set forth in considerable detail the history of the Plan's development and execution.

A. Background

Under the National Housing Act of 1949, 1949 U.S. Code Cong. Serv., p. 408, urban renewal was characterized predominantly by slum clearance programs. These involved the total demolition and clearance of badly deteriorated target areas, frequently resulting in massive relocation of hundreds of families to substandard housing elsewhere in New York City. Entirely new communities were then built on the cleared sites in accordance with the predetermined urban renewal plan.

Growing national dissatisfaction with slum clearance led to changes in the concept of urban renewal and was reflected in the federal legislation. The provision of the National Housing Act were amended in 1954 to expand the scope of urban renewal to include, for the first time, those areas which had degenerated but had not yet fully deteriorated. The 1954 amendments provided for redevelopment of these areas on the basis of conservation and rehabilitation of sound properties, and demolition and new construction only of those properties which had fully deteriorated.

The legislation also provided special funds for "demonstration studies" aimed at developing techniques needed in this new approach. In 1956 the City applied for, and received, federal grant funds for a demonstration study of the 20 square blocks which eventually became the West Side Urban Renewal Area.

The study was organized to determine whether realistic and meaningful proposals for renewal of the Area could be developed. James Felt, Chairman of the City Planning Commission, conducted this study (Ex. A) and published it in April, 1958. He concluded that renewal rather than demolition, was "desirable practicable and economically feasible." (Ex. A, p. 4). Moreover, Commissioner Felt found that the Area, though deteriorating, had a number of residual strengths. Its proximity to public transportation and to Central and Riverside Parks as well as to many cultural and business centers had always made it a desirable residential area. In addition, much good housing stock remained, particularly along Central Park West and the numerous brownstones on the side streets.

The study also determined that the Area was maintaining a more favorable racial and economic level than was commonly achieved at the time. From 1950 to 1956, though the Area's Puerto Rican population increased almost eight-fold and the total white non-Puerto Rican population decreased by roughly a quarter, nonetheless white families constituted more than half of all families who moved in during the period. Moreover, the median income in the Area increased by more than one-third which indicates that the white families and individuals who moved into the Area must have had above-average incomes to compensate for the low incomes of the newly arriving black and Puerto Rican families. (Ex. A, pp. 10–11).

The study demonstrated that, though the Area was threatened by obsolescence, it had nevertheless retained the foundations of a formerly sound residential area, and that it was suited for rehabilitation rather than demolition and clearance. The objective of the renewal program envisaged by the study was not to create a new community but rather to preserve and improve the existing community so as to continue to accommodate the varied needs of its population.[6]

B. The Preliminary Plan

In accordance with the Felt study's recommendation that an agency be created to draft plans for the Area, the Urban Renewal Board ("Board") was appointed by Mayor Wagner and then designated as the agency responsible for carrying out renewal of the Area. On May 28, 1959, the Board submitted its Preliminary Plan for the Area. (Ex. 5). The Preliminary Plan recommended as a goal that approximately 7,400 dwelling units of new private rental and cooperative housing be constructed. Approximately one-third of these units would be in the moderate rental range, requiring some degree of tax abatement; the remaining two-thirds would be fully tax-paying. One site, Site 29, would be designated for low income public housing, accommodating 400 units, but the Plan stated that the feasibility of including some additional units in rehabilitated structures would be explored. (Ex. 5, pp. 6, 19–20)

The City Planning Commission ("Commission") conducted hearings regarding approval of the Preliminary Plan on June 29, 1959. (Ex. 6). The community expressed substantial criticism concerning the Preliminary Plan's failure to provide a higher proportion of public and tax-abated housing to meet the needs of low and middle income families in the Area. The Preliminary Plan was nevertheless approved by the Commission, but it recommended that the number of low rent units be increased to 800, by providing for 200 additional public housing units and approximately 200 low rent units in rehabilitated buildings. The Commission also recommended an increase in the number of tax-abated, or middle income, housing from 2400 to 3600 units. (Ex. 6, pp. 9–10).

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[6] As stated in the study: "What are the yardsticks against which a successful renewal plan should be measured? A reduction of the abnormal population turnover and elimination of the excessive overcrowding which contribute so greatly to the Area's decline. Maintenance of the economic and ethnic integration which is part of its tradition, is in accord with accepted City policy, and which will take into account the needs of its present population." (Ex. A, p. 12).

After the Commission's approval, more public hearings were held by the Board of Estimate on September 17 and October 22, 1959. In its resolution of October 22, 1959 (Ex. 7), the Board of Estimate increased once again the number of low and middle income units in the Preliminary Plan. In addition, proposed modifications of the Preliminary Plan were introduced which reflected the City's concern that there be an effective relocation process as well as sufficient housing to accommodate dislocated Area residents at all income levels. Among those modifications were the following:

> 1. That the Urban Renewal Board make the necessary study of the people now residing in the redevelopment and rehabilitation areas, or as near that percentage as possible, and based on those findings, provide an increased number of middle-income and low-rent units within the project area more in line with the needs of people in these categories and advise the Board of Estimate, two months before submitting a final plan, as to the location and quantity of required middle-income and low-rent units to be provided to house all the people in these categories.
>
> 2. That the minimum goals for low-rent shall be 1,000 units and that minimum goals for middle-income shall be 4,200 units.
>
> 3. That the project be developed at densities which will maintain, in general, the present overall population density.
>
> 4. That the construction of new buildings and the rehabilitation of existing buildings be so planned that, after a minimum initial dislocation of families, new buildings will be erected before dislocating

further families; and those in the area next scheduled for demolition or rehabilitation will be given the opportunity to move into the newly-completed buildings.

5. That people be permitted to study the relocation plan and site priority machinery and have the opportunity to make recommendations to the Urban Renewal Board before the final plan is formally submitted to the Board of Estimate for adoption. (Ex. 7)

The Board of Estimate resolution made clear that the number of low and middle rent units was to be based upon the needs of Area residents as determined by a study of their income levels. Moreover, the proposal of 1,000 low rent units was a "minimum goal" and not a final determination of the number of units to be included in the Final Plan.

C. The Final Plan

The Final Plan was approved by the City Planning Commission on May 29, 1962 (Ex. 8). It proposed 1,000 units of public housing, including 200 units in rehabilitated buildings. The number of middle income units was increased to 4,200 of which 15% (630 units) were to be available at rents comparable to those in public housing under the new "skewed rental" program.[7] Thus within the Area there was to be a total of 1,630 low rent units. In addition, 607 low rent units were to be made available outside the Area, but within its immediate vicinity, including 496 at three perimeter sites: Douglas Houses Addition, Amsterdam Avenue and West 125th Street, and the site of Public School 93 at West 93rd Street and Amsterdam Avenue. The Plan also estimated that an additional 572 low rent units would be made available through the normal turnover in "existing public housing projects in nearby areas." Most significantly, however, the Commission report made plain that the number of low rent units then provided for by the Plan was not an irrevocable determination but rather the Commission's judgment at that time as to the appropriate number of housing units which would achieve the Plan's desired goals. As stated therein:

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[7] This is a procedure whereby rents in a particular building are arbitrarily varied so that some are for higher income and some are for lower income families, the overall average being fixed at the level required to operate the building economically.

> There is no method by which we can predict the exact proportions in which to allocate the number of dwelling units at each rental level in order to achieve the broad objective of the Urban Renewal Plan. It is, however, our judgment, as well as that of the several City-wide civic organizations who appeared at the hearing, that the proportion submitted by the Housing and Redevelopment Board is satisfactory and will achieve the desired goals (Ex. 8 p. 11).

The Final Plan, as approved by the Commission, provided that the Area be redeveloped in three stages: Stage I, from 93rd to 97th Streets, Stage II, 90th to 93rd Streets, and Stage III, 87th to 90th Streets. The purpose of "staging" was to minimize the disruptive effect of relocation, by enabling residents to move from one stage to another and return upon completion of their stage. (Tr. 226). The Final Plan, as approved by the Commission, also incorporated the Pilot Rehabilitation Project, comprising 81 brownstones on 94th and 95th Streets between Columbus Avenue and Central Park West, which had already been approved by the Commission and the Board of Estimate in 1960. The Pilot Project was used as a rehabilitation demonstration area "to establish more refined standards and to explore feasible methods of rehabilitation." (Ex. 8, p. 3).

Considerable community objection remained as to the number of low rent units to be provided. Suggestions for additional units varied from 2,000 units to 4,000 units with 2,500 being most frequently recommended. (Ex. 8, p. 9). Consequently, on the eve of the Board of Estimate hearing, scheduled for June 22, 1962, Mayor Wagner called a meeting to decide whether to raise the Plan's commitment to low rent units to 2,500. The meeting was attended by, among others, Milton A. Mollen, Chairman of the Housing and Redevelopment Board, Walter Fried, a member of the Board, Commissioner Felt and Herman Badillo, Deputy Commissioner of Relocation.

Mayor Wagner thereafter announced in a press release (Ex. H) dated June 21, 1962, that "[n]ew low-cost housing units within the twenty-block urban renewal area are to be increased from 1,000 to 2,500 under the terms of the Mayor's directive." The release further provided that in addition to the 1,000 units of new public housing construction, 1,010 low rent units within middle income buildings would be made available instead of the 630 originally approved by the City Planning Commission. This greater figure was to be achieved by increasing the number of middle income units and by increasing the percentage of skewed rental units within middle income projects from 15% to 20% and further, 280 units were to be provided by the Housing Authority in rehabilitated brownstones; finally, 210 additional units of public housing were to be built on the abandoned P.S. 93 site, which is adjacent to the Area. In addition to these 2,500 units within the Area and at the P.S. 93 perimeter site, Area relocatees would be given priority for apartments at two other perimeter sites: the Douglas Houses Extension at 100th Street and Amsterdam Avenue, and a new public housing project at 830 Amsterdam Avenue. It was estimated that this would provide an additional 285 low rent units.

D. The 2500 Policy

One of the critical factual issues in this litigation is the significance of the figure of 2,500 units. Plaintiffs claim, in substance, that this total was a maximum not to be exceeded, and that it included 517 units at three perimeter projects: De Hostos (built on the site of P. S. 93), 830 Amsterdam Avenue, and Douglas Addition. Defendants contend, on the other hand, that 2,500 was intended as a minimum commitment, and that only in that sense are perimeter projects other than De Hostos included.

We will discuss this issue at length later in this opinion. We note here, however, that the source of the 2,500 figure appears to be the Mayor's press release. That release, which included only the P.S. 93 site in its calculation of the 2,500 units, made no mention of whether the figure was a minimum or a maximum. Mr. Fried, however, testified that Mr. (now Congressman) Badillo regarded the 2,500 commitment as necessarily a minimum calculation and that Mayor Wagner accepted that position. (Tr. 838, 923).[8] In materials presented to the Board of Estimate (Ex. D) following the meeting with Mayor Wagner, Congressman Badillo stated that the 2,500 units were "to be provided both within the site [Area] and in the area adjacent to and surrounding the site [Area]," and that additional low rent units would be provided "by building additions to existing projects, rehabilitating brownstones, and as a result of turnover in existing low-rent public housing in the vicinity." (Ex. D, p. 7). Moreover, Congressman Badillo testified at trial that the Mayor's announcement of 2,500 low rent apartments was intended to be a minimum. (Tr. 3836).

It should be noted that on several occasions after 1962, the City reaffirmed its policy of providing 2,500 low income units. For instance, on December 9, 1966,

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[8] Mr. Fried, who is currently Vice-Chairman of the New York City Housing Authority, also testified that the press release was inaccurate and that Mayor Wagner intended that all three perimeter sites be included within the 2,500 committment. (Tr.838).

Jason R. Nathan, Chairman of the Housing and Redevelopment Board, stated before the Board of Estimate that his agency would provide a minimum of 2,559 low rent units in the redevelopment of the Area. (Ex. 2). Thereafter, on October 6, 1967, in an open letter sent to Area residents, the Housing and Development Administration ("HDA")[9] reaffirmed the City's policy of creating 2,500 low rent units. (Ex. 3). Finally, on October 25, 1967, Mr. Nathan, appearing before the Board of Estimate on the proposed disposition of Site 6, again reaffirmed the City's intention "to build 2,500 units of low income housing in the Upper West Side," (Ex. 4, p. 1) and stated that the percentage of low income units in certain middle income buildings would be raised from 20% to 30%. The Nathan statement concluded with the following:

> The most important result is that housing for low income families will be in ample supply. There will be enough not only to meet the needs of the residents of the neighborhood who must be relocated, but to fulfill the total commitment of 2,500 apartments to which the city is pledged. (Ex. 4, p. 3).

E. Execution of the Plan: 1962-1968

The Plan went into execution in January, 1963. Construction went forward despite delays and administrative problems. By 1966 four public housing projects were ready for occupancy within the Area as well as the three perimeter projects (De Hostos, 830 Amsterdam, and Douglas Addition). (Ex. 5). As a result of the Plan's tangible achievements there was an increase in the investment of private capital. Among the numerous site sponsors and purchasers were plaintiff Trinity School, which invested over nine million dollars in Site 24 as a combination school and middle income housing project, and plaintiff intervenors Karlen and Hudgins, who invested $148,000 and $265,000 respectively in their brownstones in the Pilot Project Area. Plaintiffs contend that it was in this atmosphere of optimism and progress that they made their decisions to remain in or move into the Area.[10]

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[9] HDA is the successor City agency to the Housing and Redevelopment Board by virtue of the New York City Charter (Local Law #58, adopted July 28, 1967) and Executive Order of the Mayor #56 dated November 28, 1967 which provides December 1, 1967 as the effective date of Local Law #58.

Between 1963 and 1966 the City amended the Plan four times, the first two carried forward proposals for public housing. The first amendment (1963) approved a plan for the acquisition and rehabilitation by the City Housing Authority of 36 brownstones for low income housing. (Ex. 11). The second (1964) provided for conversions of Site 36 from fully tax-paying housing to public housing and of Sites 12, 13 and 14 from fully tax-paying to partially tax-exempt housing at moderate rentals. (Ex. 15, 16). In approving these changes, the City Planning Commission reemphasized its previous statement in connection with the adoption of the Final Plan:

> There is no method by which we can predict the exact proportions in which to allocate the number of dwelling units at each rental level in order to achieve the board objective of the Urban Renewal Plan. (Ex. 15, p. 4).

The third amendment (1965) involved a change in the mode of rehabilitation of Site 23. (Ex. 17, 18). The fourth amendment (1966) provided for conversion of Sites 5 and 10 from fully taxpaying to partially tax-exempt housing and reconversion of Site 36 from public housing also to partially tax-exempt housing. (Ex. 19, 20).

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[10] Other brownstone residents who testified in behalf of plaintiffs made similar claims. They are represented in this action by CONTINUE whose active membership is made up primarily of middle income brownstone owners in the Area; they are opposed to further changes in the Plan contending it will cause the Area to deteriorate.

The initial conversion of Site 36 to public housing by the second amendment brought the number of public projects planned for the Area to a total of five. The fourth amendment, however, reduced that figure to four, the number originally proposed in Mayor Wagner's 1962 press release. (Ex. H). All of these amendments to the Plan were enacted before any of plaintiffs entered into contracts with the City regarding sponsorship of their sites.

After the four public housing sites were completed in 1965, the next cycle of buildings readied for occupancy were four Mitchell-Lama cooperatives (Sites 8, 11, 16 and 17), using the skewed rental method for low-rent units, and a Mitchell-Lama rental building[11] (Site 14), using the State Capital Grant Assistance Program[12] for low rent units (Ex. 5).

By the time these first five Mitchell-Lama developments opened in March-May, 1967, a sharp increase in construction costs threatened the City's ability to meet its commitments for adequate low and moderate income housing. Between 1964 and 1967, because of construction costs and increasing interest rates, Mitchell-Lama rents more than doubled. The increase was so drastic, in fact, that for a while the program was suspended. (Tr. 2657-2660). The increase threatened not only programs providing moderate income units but skewed rental as a means of providing units at rents equivalent to public housing. There was a limit to how much differential between the skewed rental units and the other units would be feasible. Even before the drastic increase of costs in Mitchell-Lama developments began, the skewed rental units rented at levels higher than public housing.

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[11] Mitchell-Lama housing is the generic or common term used for moderate and middle income housing developed pursuant to Article II of the Private Housing Finance Law of the State of New York and assisted by state or municipal mortgage loans and real estate tax exemption.

[12] This is a subsidy program under which individual apartments are rented at market rental by the local housing authority and then subleased to a low income family at public housing rental with the difference being subsidized by the State.

The City's Commitment to low and moderate income housing was in jeopardy; this can be seen in Mr. Nathan's statement of December 9, 1966 before the Board of Estimate (Ex. 2) in support of the fourth amendment to the Plan wherein he acknowledged that the City's "commitment" to 2,500 low rent units in the Area had been only a hope, principally because the only program available, other than public housing construction, was the skewed rental program. Mr. Nathan then announced that in addition to 400 skewed rental units in cooperative projects, 400 units would be provided by the Housing Authority under the leased public housing program,[13] and a minimum of 306 units under the State Capital Assistance Program. (Ex. 2, p. 2).

Subsequent difficulties, however, threatened a portion of the leased public housing promised within Mitchell-Lama projects. Accordingly, on October 25, 1967, Mr. Nathan again appeared before the Board of Estimate (Ex. 4) and advised that, in order to fulfill the 2,500 policy, the percentage of all public housing leasing would be raised from 20% to 30%, and that the percentage of state capital grant units on Site 6 would similarly be increased from 20% to 30%. (Ex. 4, pp. 1-2).

F. Execution of the Plan: 1968–1973

By 1968 construction of low income housing had come to a standstill. It had become clear that the Mitchell-

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[13] This program operates in the same manner as the State Capital Grant Program but is subsidized instead under the federal public housing program.

Lama program was no longer an economically feasible means of providing moderate income housing. This dilemma forced the City to find a new source of funds for middle income housing. The solution, albeit imperfect, was the Section 236 housing subsidy which became available from the federal government in 1968.[14] Using this subsidy in combination with Mitchell-Lama financing, rents could be cut almost in half. (Tr. 3167).

The first projects built in the Area using the combination of subsidy programs, Mitchell-Lama and Section 236, were Columbus Manor and Westwood House (Sites 21 and 22), both of which opened in June, 1971. The third was Leader House (Site 20), which opened in August, 1972. All used the leased public housing program to make available 30% of their units for low income households.

Although the Section 236 program was intended to provide moderate or middle income housing (Ex. 54) and not to supplement public housing, the program was restricted to persons with income no greater than 135% of the limit for public housing eligibility.[15] The program thus worked to exclude families whose incomes, though beyond the Section 236 limits, were such that they could not afford newly constructed Mitchell-Lamas. (Tr. 3166, 3758–3759). At the same time, because of the relatively low rentals in Section 236 buildings and the scarcity of low income housing, the Department of Social Services began to place welfare-assisted families in middle income units.[16] (Tr. 3194). As a result of this policy, and in order to meet the demands of Area relocatees, Leader House, Columbus Manor and Westwood House were occupied by low income households substantially in excess of their 30% allocation. (Tr. 1430, 2002, 3194–3195).[17]

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[14] This is a program whereby the interest rate on a federal or state financed mortgage is subsidized down to 1% in order to bring the rent of an individual apartment down a level that is 25% of the tenant's income. See 12 U.S.C. § 1715z–1(c).

[15] There is, however, an alternative "exception limit" according to which 20% of the total amount of interest reduction payments can be made for families whose incomes exceed this 135% formula but do not exceed the income limitations set forth at 12 U.S.C. § 1715*b*(d) (3). The following table, submitted by the City (by agreement of the parties) after trial at the direction of

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the Court (Tr. 3828–3829), sets forth the respective Section 236 public housing and housing authority income limits as of May 23, 1974 (see letter of Robert Liner, Esq. to the Court dated June 3, 1974):

Income and Rent Limits in
New York City
under Subsidized Federal Programs

ADJUSTED ANNUAL INCOME LIMITS

No. of Persons	236 Regular	236 Exception	Rent Supplement	Housing Authority Leasing
1	$ 8,235	$ 9,250	$ 6,100	$ 6,300
2	10,530	11,250	7,800	8,160
3	11,340	13,250	8,400	9,360
4	12,150	13,250	9,000	9,360
5	12,690	15,200	9,400	10,200
6	13,230	15,200	9,800	10,200
7	13,770	17,200	10,200	11,040
8	14,310	17,200	10,600	11,040
9	14,580	17,200	10,800	11,520
10 or more	14,850	17,200	11,000	11,520

[16] Pursuant to the Court's direction (Tr. 3828–29), the City certified the following information regarding the number of welfare assisted families at the three projects, including both leased public housing as well as the program initiated by the Department of Social Services (see letter of Hadley W. Gold. Esq. to the Court, dated May 28, 1974): A. Total Welfare assisted families (various programs) in *Leader House*, excluding elderly and disabled: *62*. B. Total Welfare assisted families (various programs) in *Columbus Manor*, excluding elderly and disabled: *50*. C. Total Welfare assisted families (various programs) in *Westwood House*, excluding elderly and disabled: 27.

[17] Defendants concede the low income families occupy up to 50% of the total units in these buildings. (Tr. 3320–3322). Plaintiffs contend, however, that because of this policy as well as the similarity of Section 236 income limits to public housing limits, almost the full occupancy of these buildings is low income housing.

As of January, 1969, 1,230 public housing units had been completed. In addition, about 20% of the 1,769 completed middle income units were inhabited by low income households; this made for a total of 1,584 completed low rent units. (Ex. 65). With Section 236 subsidies in short supply and the only buildings under construction being middle income, there was a growing community sense that the commitment to provide adequate low income housing would not be met. Eventually the City converted Sites 4 and 30 from middle income to low income housing; it was this decision that precipitated the litigation before us.

Robert Hazen, then Commissioner of Development at HDA, testified at trial as follows regarding the circumstances leading to the conversion of Sites 4 and 30 to public housing:

> The events were that the subsidies for the moderate income housing, so-called Section 236, were, as I have indicated, in short supply and the long term feasibility, looking ahead, was uncertain at best. There was also a feeling on the part of many community representatives with whom the city met that the project had taken off economically in the sense that it was becoming more and more a fashionable middle to upper middle income neighborhood and that perhaps there was a danger that the low rent commitments would either not be met through delay or not be met through the inability of the subsidy—that particular subsidy program to work. (Tr. 3173).

However, despite the shortage of Section 236 subsidies, a direct public housing construction program was available. Accordingly, both community and government leaders came to support additional public housing constructions as the logical means of carrying out the City's policy. (Tr. 3173–3174).

At the same time (Spring, 1970), squatters occupied several buildings in the Area awaiting demolition, including that on Site 30. Their arrival, while not a new phenomenon in the City's urban renewal experience, exacerbated tensions between those who advocated an increase in the number of low rent units in the Area and those who felt that such an increase would be contrary to the letter and spirit of the Plan and would adversely affect the character of the Area. While most squatters were not from the Area, and to that extent were not Area relocatees entitled to "Area priority" in the allocation of low rent units,[18] nonetheless their presence pointed up the general need for low-rent housing and inevitably increased both political and community pressure for the creation of more low income units within the Area. Rather than evict the squatters, as plaintiffs contend should have been done, the City entered into rental agreements with them permitting them to remain until demolition was ready to proceed. The City has stated that according to HDA records there are currently 274 squatter families residing within the Area.[19]

In response to these pressures, the Housing Authority proposed conversion of Site 4 from fully tax-paying to public housing (270 units). The conversion was approved by the City Planning Commission on August 12, 1970 (Ex. 24) and by the Board of Estimate on September 17, 1970 (Ex. 28). Currently, however, there are no available funds to construct Site 4.

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[18] HDA has stated that its policy regarding the squatters is that it will provide alternate temporary quarters in the area so long as they are available and ultimately consider the squatters for any remaining units "not required to meet the needs of those with higher relocation priorities." (Ex. 26, p. 5). We take this to mean that those squatters who were not originally Area residents will not be considered among the relocatees to whom the City is committed to provide housing within the Area. Accordingly, the number of low income units within the Area will not be increased to provide housing to those squatters who were not Area residents.

[19] See letter of Hadley W. Gold, Esq. to the Court, dated May 28, 1974.

Similar considerations, particularly the unavailability of subsidies for middle income housing and unmet relocation needs, led to the proposed conversion of Site 30 from middle income to public housing (160 units). The proposal was approved by the City Planning Commission on August 11, 1971 (Ex. 26) and by the Board of Estimate on November 11, 1971 (Ex. 27). The report of the Commission approving the conversion shows that while one community organization, presumably CONTINUE, argued that the proposal would upset the balance between low and middle income housing, the bulk of opposition was on the ground that construction of a new project would require demolition of existing buildings occupied by squatters. Several community organizations and two dissenting members of the Commission favored rehabilitation of the existing building for the benefit of the squatters residing therein. The Commission, however, in approving the conversion and rejecting equal preference for squatters, stated, in part:

> All new housing in the West Side Urban Renewal Plan, including that proposed for site 30, was intended to provide relocation for on-site tenants displaced by the renewal activity. The original tenants on site 30, and thousands of original residents of the west side area, left their homes with the firm guarantee that they would have first priority in moving back into the new housing to be constructed. That guarantee still stands.
>
> If the City is to honor its obligation to those families who accepted the painful necessity of relocation, it must not accord a higher relocation priority now to others who have since taken over apartments the original tenants left.
>
> Failure by the City Planning Commission to approve the public housing project would leave the status of the renewal plan unchanged and site 30 would still be designated for middle-income housing. This would leave the status of the site in doubt and delay the building of greatly needed housing for the area. (Ex. 26, pp. 4–5).

G. Plans For Future Development

In October, 1973 the State of New York assumed responsibility for completion of the Plan. Lee Goodwin, New York State Commissioner of Housing and Community Renewal, testified:

> After reviewing a number of proposals with the City and considering a number of options to put this money in other parts of the State, we concluded that the most desirable use of funds from both the City's and State's standpoint would be the completion of the West Side Urban project which had been in planning and execution for more than a decade. (Tr. 3784).

The State and City are proceeding with the development of Site 41 and Site 44. Thereafter, the State has agreed with the City to undertake the development of Sites 9, 32, 35 and 45/46 (constituting a single site). All of the proposed projects will be financed through the Mitchell-Lama and Section 236 programs, with 30% of the units designated for low income families under leased public housing. (Tr. 3792–3796).

II. THE SIGNIFICANCE OF THE CITY'S LOW INCOME HOUSING POLICY

As we have discussed above, a critical issue here is the City's announced policy to provide 2,500 units of low income housing. A parallel issue, which we consider below, is the City's policy of maintaining a 70%:30% ratio of middle to low income units in middle income buildings in the Area. We find, on the basis of the history of the Plan from its initial promulgation until the present, that the 2,500 figure was intended neither as a fixed minimum nor as a maximum. Rather it was a political judgment on the part of City officials as to an appropriate number of units which would satisfy the housing needs of low income relocatees desirous of returning to the Area, while not compromising the Plan's overriding objective to create a racially and economically integrated community. No legal or binding commitment by the City was intended; the 2,500 figure was instead a statement of policy and intention. It was aimed at meeting the needs of low income relocatees to the maximum extent possible without endangering the private capital investment so necessary to economic integration. Both Roger Starr, Administrator of the Housing and Development Authority[20] and Walter Fried, then Vice Chairman of the Housing and Redevelopment Board (the City agency which administered the Plan), testified that balancing of these two interests was the critical factor in determining the number of low rent units to be constructed in the Area. (Tr. 397, 444, 889). Moreover, contrary to plaintiffs' assertions, the right of relocation was itself a paramount Plan objective. Though the testimony on this point is conflicting (Tr. 397, 714, 3157), the documentary history of the Plan makes clear that the City was committed to provide sufficient Area housing to low income relocatees desirous of returning. This feature of the Plan has never changed.[21]

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[20] Mr. Starr was appointed HDA Administrator after his testimony in this litigation. His views do not necessarily represent those of HDA.

[21] As late as 1969 when the Plan by all accounts was still being properly executed. HDA administrator Nathan included the following statement in his progress report:

> The originally estimated completion date of the project was March, 1969. 1973 is now cited as the probable time of completion. The reasons for this delay are many. However, the problem of satisfactorily relocating the area's population in accord with the city's commitments is the primary cause of delay. Staging; attempting to temporarily on-site families so as not to necessitate their moving off the site while construction is in process; promising to provide satisfactory housing for all of those living in the area when the city took title who wanted to remain—these are all aspects of the relocation process contributing to the delay.

It is also clear that the 2,500 figure was intended as an estimate which could be modified subject to changing needs and conditions. That estimate, which was itself the product of numerous revisions, represented an assessment of low income housing needs balanced against the objective of maintaining economic integration. The assessment of such needs must inevitably vary[22] and it has been established here that the economic conditions

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> While it is true that a delay of almost Four (4) years results in greatly increased construction costs and therefore higher rents, this cost must be measured against the social benefits resulting from disrupting the population as little as possible and providing new housing for those whose homes were torn down. (Ex. 65, p. 3).

This statement was made before the advent of the squatters whose presence, plaintiffs contend, was the real reason for the conversion of Site 30.

[22] At the conclusion of trial, the City (by agreement of the parties) certified the following information regarding the status of Area relocatees (see Mr. Gold's letter of May 28, 1974 to the Court):

West Side Urban Renewal Area
Relocatees

A. Relocatees in the West Side Urban Renewal Area on date of vesting of title in the City of New York	5,838
B. Relocatees placed in housing in the West Side Urban Renewal Area to date	1,900 to 2,000
C. Relocatees presently residing on temporary holding sites within the West Side Urban Renewal Area	114
D. Relocatees presently residing off-site who have expressed an interest to return	728
E. Relocatees listed on HDA fiscal list in addition to above	(approximately) 2,500
F. Relocatees, individuals and families, not locatable	(approximately) 480

assumed at the inception of the Plan have themselves drastically changed. (Tr. 2660–2661). Accordingly, in order for plaintiffs to establish that the City is now violating the Plan by increasing the number of low income units in the Area, they must show that such an increase would endanger the integration of the Area and therefore the underlying purpose of the Plan.

Closely related to the 2,500 policy is the issue of the City's allegedly binding commitment to a 70%:30% ratio of middle to low income housing in the Area. It is important to note that, unlike *Otero, supra*, we are not dealing here with regulations adopted by the City pursuant to law, but rather with political intentions. The HDA statement of October, 1967 (Ex. 4) declared that the percentage of State Capital Grant units on Site 6 and of all public housing in Mitchell-Lamas contracted for thereafter would be increased from 20% to 30%.[23] In January, 1973 an HDA memorandum reaffirming the City's "commitment" to the "70:30 policy" declared in pertinent part:

> In 1971, after lengthy discussion in the West Side Community and due consideration of the needs and character of that community, HDA agreed, with the express approval of the Mayor's office, to a new policy concerning the tenant mix in all buildings which have the benefit of interest reduction subsidies under Section 236 of the National Housing Act in the West Side Urban Renewal Area. The policy, which was first adopted by community Planning Board No. 7, calls for maintenance of a ratio of 70%:30% between moderate and low income families in 236 building. (For this purpose, moderate income refers to families and individuals meeting the income requirements of the Section 236 program, including the exception limits, if and when allowed by HUD.) (Ex. 54).

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[23] The 70%/30% ratio is included in Trinity's contract with the City as sponsor of a Mitchell-Lama on Site 24 (Ex. 14, Tr. 1035).

It is probable that the 70%:30% policy was intended to include all Section 236 Mitchell-Lamas, as well as those using leased public housing to fulfill their low income requirement and which were constructed after the October, 1967 statement. Indeed, the 1973 HDA memorandum declared that violations of the policy at Leader House (Columbus Manor and Westwood House) were to be corrected through ordinary turnover. However, consistent with our finding with respect to the alleged 2,500 commitment, we conclude that the 70%:30% ratio was never intended as an irrevocable commitment binding upon the City. Furthermore, to sustain their claim with respect to this issue plaintiffs must establish that failure to adhere to the 70%:30% policy would likewise threaten the integration of the Area and consequently the underlying purpose of the Plan. This plaintiffs failed to accomplish by proof clear and convincing.

III. THE CITY'S CONTRACT WITH TRINITY

Two of the issues before us involve alleged breaches of contract by the City; the first of these is closely related to the City's policy of providing 2,500 low income units and a 70%:30% ratio of middle income to low income tenants in middle income buildings; the second (*infra* at IV) relates to the alleged breach by the City of its contract with Karlen and Hudgins, brownstone owners. Plaintiffs contend, with respect to the first issue, that the City breached its contract with Trinity by reason of "the general changes in the West Side area after the fourth revision of the West Side Urban Renewal Plan." (Tr. 48, 51). They claim, in substance, that City officials orally advised them that the Plan's principal objective was to create a racially and economically integrated Area, and that this objective could best be achieved by the inclusion in the Plan of 2,500 units of low income housing; that this method would permit the City to deal equitably with the relocatees and, at the same time, preserve a healthy economic balance in the Area. The 2,500 units figure became, in effect, a part of the various agreements made by the City with sponsors and with other persons making a commitment to the Area under the terms of the Plan. Plaintiffs argue that any change by the City with regard to its 2,500 and 70%:30% policies, or in the Plan generally, including the conversion of Site 30 from middle to low income use, would constitute a breach by the City of its contract.

Trinity was represented by Elliot Lumbard, Esq. in dealing with the City as to Trinity's sponsorship of Site 24. Trinity claims that during the period in which it was considering sponsoring Site 24 (1963–1968), Judge Milton Mollen, then Chairman of the Housing and Redevelopment Board, and other City officials assured Mr. Lumbard that Trinity could rely on the Plan being executed as it was then formulated since it had the full support of the Mayor and governing officials. (Tr. 966–972). Mr. Lumbard testified that Trinity was concerned about the solidity of the Plan and the future of the Area. He stated that City officials had assured him that they shared his concern and to that end had allocated definite income uses for each of the Area sites, including Site 30. (Tr. 982–984). Although Mr. Lumbard met on several occasions with City officials, he placed the greatest emphasis on, and recalled with the greatest particularity, two meetings attended by Judge Mollen in 1963 and 1964. At the second meeting Judge Mollen expressed the City's interest in keeping Trinity in the Area as a site sponsor; he made the alleged representations that Trinity could rely upon the Plan and referred to large charts showing the income designations for the various sites. (Tr. 1065).

Other area residents testified that similar representations were made to them. Specifically they alleged that Colonel William Hunter and Mr. Joseph Luria, who managed the City's Area office, represented to them as potential brownstone purchasers that the Plan called for a maximum of 2,500 low income units and that 30% of the units in middle income buildings would be allocated to low income families. (Tr. 1271, 1289, 1509, 1800, 1949, 1955). Plaintiffs maintain that these representations became implied and enforceable provisions of the City's contracts with respective purchasers of brownstones because they were indispensable in effecting the mutual concern of creating a balanced community.

However, the language of their respective contracts forecloses the claims of Trinity and brownstone purchasers. Section F of the 1966 Fourth Revision of the Plan (annexed to and incorporated into Trinity's contract with the City, Ex. 14) specifically authorizes the City to modify and amend the Plan at any time subject only to the consent of the purchaser or lessee of the particular parcel covered by the modification. Section F provides as follows:

> F. *Changes in Approved Plan*
>
> This Urban Renewal Plan may be modified at any time by the City of New York, provided that if modified after the disposition of any land in the project area such modification must be consented to in writing, by the purchaser or lessee or their successors in interest of the specific property covered by the modification. This shall not be construed to require the consent of the purchaser or lessee or their successors in interest of any other parcel in the project area.

The parol evidence rule provides that in order for a purported oral agreement to vary a written contract, the oral agreement must not modify or contradict express or implied provisions of the written instrument. Mitchell v. Lath, 247 N.Y. 377, 160 N.E. 646 (1928); Aratari v. Chrysler Corp., 35 A.D.2d 1077, 316 N.Y.S.2d 680 (1970). Accordingly, to the extent that the alleged oral representations to Mr. Lumbard are construed as a promise by the City that it would not modify the Plan, they amount to prior negotiations that are inconsistent with an express provision of a written contract and therefore barred by the parol evidence rule.

The underlying concept of urban renewal demands that the Plan could be modified at any time. Walter Fried and Roger Starr both testified that every urban renewal plan is subject to change and required flexibility for change in order to accomodate changing social, economic and racial conditions. (Tr. 398–400, 627-628, 935). Indeed, though Mr. Lumbard was unaware of it, the Plan, by the time Trinity entered into its contract with the City, had already undergone four revisions, including the changes in the income designation of Site 36. Thus the alleged representation that the Plan would not be modified is inconsistent not only with the express provision authorizing modification but also with the history of the Plan and the underlying concept of urban renewal.

Plaintiffs introduced into evidence two contracts by purchasers of brownstones from the City of New York (Ex. 35a and Ex. 2 annexed to plaintiff's motion for a preliminary injunction). Section 110 of the contracts states that all prior understandings and agreements are merged into the contract, and that neither party relies upon any statement or representation not embodied in the Contract. Section 110 provides as follows:

> §110.
>
> It is understood and agreed that all understandings and agreements heretofore had between the parties are merged into this contract, which alone fully and completely expresses their agreement, and that the same is entered into after full investigation, neither party relying upon any statement or representation not embodied in this contract, made by the other. The Purchaser has inspected the building standing on said premises and is thoroughly acquainted with its condition.

The existence of this merger clause precludes the use of parol evidence to establish a breach of contract. Jones Memorial Trust v. TSAI Investment Services, 367 F. Supp. 491 (S.D.N.Y. 1973); Hamilton Life Insurance Co. of New York v. Republic National Life Insurance Co., 291 F.Supp. 225 (S.D.N.Y. 1968); Fogelson v. Rackfay Construction Co., 300 N. Y. 334, 340, 90 N.E.2d 881 (1950).

Even in the absence of such a merger clause, the parol evidence rule would bar use of the alleged representations to establish a breach of contract and for the same reasons stated above regarding Trinity School. Though the Plan was not actually annexed to the two contracts admitted into evidence,, it is clear that they are subject to its provisions. Section 405 of both contracts states this explicitly:

> "405. Wherever the provisions of the West Side Urban Renewal Plan, as amended through the date of execution of this Agreement, are inconsistent with the provisions of the Pilot Plan, annexed thereto, the provisions of the West Side Urban Renewal Plan, as amended as aforesaid shall govern."

Accordingly, Section F of the Plan, set forth above, governs the contracts and therefore excludes reliance upon alleged prior representations as implying a contemporaneous agreement which could not be modified.

Finally, there is doubt that the alleged representations were ever made in the form recalled and if so whether they were misconstrued and improperly relied upon. Colonel Hunter testified he never made any statements to anyone on any occasion that there would be 2,500 units of low income housing or that there would be an economic mix of 70% middle and 30% low income residents. (Tr. 3604–05). Plaintiffs' counsel stipulated that Mr. Luria if called would give the same testimony. Judge Mollen testified that he would not have undertaken to represent that he could bind the

City regarding the Plan or any of its provisions because, as was demonstrated by its history, the Plan was subject to amendment. (Tr. 3686). Moreover, he gave testimony that Messrs. Hunter and Luria were never authorized to make binding commitments upon the City regarding the Plan. (Tr. 3687). This is consistent with Exhibit 13, a brochure published by the Housing and Redevelopment Board entitled "Rehabilitation in the West Side Urban Renewal Area" which states, at page ii, that the function of its representatives at the site of office was to "process applications for purchase and sponsorship of brownstones and furnish guidance and advice with respect to architectural and financial requirements and assistance." Thus, not only did Hunter and Luria lack authority to make such representations, but HRB explicitly limited the scope of their authority. The law is clear that acts or statements by City employees beyond the scope of their authority are not binding upon the City. United States v. City of New York, 131 F.2d 909 (2d Cir. 1942); Dalton v. Van Dien, 72 Misc.2d 287, 339 N.Y.S.2d 378 (1972); Lindlots Realty Co. v. Suffolk County, 278 N.Y. 45, 15 N.E.2d 393 (1938); 53-04 97th Place Corp. v. City of New York, 156 Misc. 706, 282 N.Y.S. 519 (Mun.Ct.1935).

As we see it, plaintiffs have failed to show that the City or its employees ever made a commitment to a fixed and immutable number of percentage of low income units. Indeed, such a commitment would have been inconsistent with both the history and purpose of the Plan. As we have found, the 2,500 figure was never intended as a minimum or maximum number of low income units but rather as an estimate of the number of units needed to satisfy the demand for relocatee housing consistent with the objective of creating an economically and racially integrated community. That estimate would inevitably change, as it had in the past, to meet the shifting needs and demands of the community so long as such change did not threaten the Plan's objective. (Tr. 3158)

IV. THE CITY'S CONTRACT WITH KARLEN AND HUDGINS

Plaintiff-intervenors Karlen and Hudgins are, as discussed above, brownstone owners residing within the Pilot Project Area. We now consider whether the City was required to obtain written consent from them when it converted Sites 4 and 30 from middle to low income housing. Defendants concede that no such consent was sought or obtained.

They contend that this issue is governed by Section R of the "Final Plan for the Rehabilitation Demonstration Pilot Project" ("Pilot Project Plan") which provides:

> R. *Changes in Approved Plan*
>
> This Final Plan may be modified at any time by the City of New York, provided that if any such modification affects any real property previously disposed of by the City in the Pilot Project area, written consent to such modification must be obtained from the purchaser or lessee of such real property.

Plaintiffs claim that, pursuant to this provision, any change in the Urban Renewal Plan relating to any site in the Area (including but not limited to the Pilot Project area) which affects property within the Pilot Project Area must be consented to in writing by the owner or lessee of such property. Inasmuch as Karlen and Hudgins are affected by the conversion of Sites 4 and 30 to low income housing, though these sites are outside the Pilot Project Area, the City, they claim, was obliged to secure their consent to the conversion.

Plaintiffs' claim must be denied. The Pilot Project Plan was developed and intended as a forerunner to the Urban Renewal Plan ("Plan") as a means of developing refined standards and techniques for the execution of the Plan. When it was promulgated in 1962 the Plan became the definitive program for the development of the entire Area, and any inconsistencies with the Pilot Project Plan were to be resolved according to the terms of the Plan. To that end, Section 405 of both the Karlen and Hudgins contracts provides:

> 405. Wherever the provisions of the West Side Urban Renewal Plan, as amended through the date of execution of this Agreement, are inconsistent with the provisions of the Pilot Plan, annexed thereto, the provisions of the West Side Urban Renewal Plan, as amended as aforesaid shall govern.

Section F of the Plan provides:

> F. *Changes in Approved Plan*
>
> This Urban Renewal Plan may be modified at any time by the City of New York, provided that if modified after the disposition of any land in the project area such modification must be consented to in writing, by the purchaser or lessee, or their successors in interest of the specific property covered by the modification. This shall not be construed to require the consent of the purchaser or lessee or their successors in interest of any other parcel in the project area.

According to Section F, then, the Plan may be changed at any time subject only to the consent of the purchaser or lessee of the specific property covered by the modification.

We conclude that Section R of the Pilot Project Plan is inconsistent with Section F of the Plan. Therefore, Section F governs with respect to any changes in the Plan regardless of the impact upon property in the Pilot Project Area so long as that property is not the subject of the modification.

Plaintiffs further claim that there is no inconsistency between Sections R and F, that Section F deals with other owners in the Area but outside the Pilot Project Area. Were this proposition adopted, residents of the Pilot Project Area would have a right to veto any change in the Plan irrespective of whether the change covered property in the Pilot Project Area so long as they could show that the change affected their property. Area residents who resided outside the Pilot Project Area, however, would have no such right regardless of the impact upon their property for the sole reason that they do not reside in the Pilot Project Area. This is clearly untenable and must be rejected.

In order to succeed with any of these contract issues, however, plaintiffs must demonstrate not only that the City has breached its contracts with them, but also that they have suffered some sort of injury as a result of this breach. The purpose of the Plan, and clearly the intent of all contracts entered into pursuant thereto, is the racial, ethnic and economic integration of the Area. To show injury, therefore, plaintiffs must demonstrate that the City's alleged breaches threaten the Area's integration, or, in other words, that the Area will "tip." Whether the Area will tip, however, involves considerably more than its part in the resolution of the breach of contract issues; it goes to the very heart of this entire litigation and so we now undertake to deal with it.

V. TIPPING

A. Introduction

This issue is the crux of the litigation. Essentially, plaintiffs contend that the Area is in danger of tipping; that, given existing conditions, as more low income residents are introduced into the Area, the tipping point will be exceeded, middle income residents will flee the neighborhood which will then rapidly deteriorate. For this reason plaintiffs ask, *inter alia,* that this Court halt the planned construction of Site 30 as low income housing. While plaintiffs recognize that tipping has been considered a racial issue, they maintain that its true characteristic is the low income of the families involved, and that the racial element is a subsidiary factor. Specifically, they assert that "the indiscriminate admission of relocatee low income families" has caused the Area to reach the tipping point. Defendants respond that the "tipping phenomenon is a racial issue which relates to economics only insofar as minority persons, i.e., blacks and Puerto Ricans, are often associated with persons of low income." We have concluded that defendants must prevail on this issue. Our reasoning, set forth more fully below, has two grounds: (1) the concept of tipping is racial and only incidentally related to income, and (2) even assuming that tipping does include economic classifications, plaintiffs have failed to show that the Area is, or is in danger of, tipping.

The primary issue in Otero v. New York City Housing Authority, 484 F.2d 1122 (2d Cir. 1973), was whether the New York City Housing Authority was required to comply with its own regulation regarding selection of tenants for a public housing project. The Authority argued that to do so would create a non-white pocket ghetto that would operate as a tipping factor which would cause white residents to take flight and lead eventually to non-white ghettoization of the community.[24] The District Court granted summary judgment for plaintiffs, holding that, although the Housing Authority had a duty to foster and maintain racial integration, this duty could not, as a matter of law, be given effect where to do so would deprive a non-white minority of low cost public housing which would otherwise be assigned to it under the Authority's regulation. Our Court of Appeals reversed and remanded on the ground that there was a genuine issue as to whether the non-white concentration in the two project apartments would have a tipping effect which the Authority, in exercising its duty to integrate, was entitled to avoid by suspending operation of the regulation.

Plaintiffs herein impliedly invite us to expand the concept of tipping to include economic as well as racial classifications. We decline for two reasons: First, no legal authority exists for the proposition advocated by plaintiffs. Second, the concept of tipping cannot be successfully expressed in economic terms.

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[24] *Otero* used the term "non-white" to include Puerto Ricans "for purposes of this appeal only." 484 F.2d at 1126, n.4

The concept of tipping has heretofore been recognized only as a racial issue. In *Otero* the Court spoke of tipping solely in the context of changing racial concentrations within a neighborhood. That case followed an established line of authority holding that it is improper to build a housing project in a community which will cause a disproportionate increase in the concentration of minority persons tending to make the community a racial ghetto. Shannon v. HUD, 436 F.2d 809 (3rd Cir. 1970); Banks v. Perk, 341 F.Supp. 1175 (N.D. Ohio 1972); Blackshear Residents Organization v. Housing Authority of the City of Austin, 337 F.Supp. 1138 (W.D. Tex. 1971); Crow v. Brown, 332 F.Supp. 382 (N.D.Ga 1971), and Gautreaux v. Chicago Housing Authority, 296 F. Supp. 907 (N.D.Ill.1969), aff'd, 436 F.2d 306 (7th Cir. 1970), cert. denied, 402 U.S. 922, 91 S.Ct. 1378, 28 L.E.d.2d 661 (1971). Professional analysis has similarly equated tipping with racial change. *See* Ackerman, "Integration for Subsidized Housing and the Question of Racial Occupancy Controls," 26 Stanford L.Rev. 245, 260 (Jan. 1974), whcih concluded that housing projects which tipped had one or more of the following characteristics: (1) located in or near a minority area, (2) a black population well in excess of 30% of the population, and (3) a combined non-white population exceeding 50% of the total project population.

Secondly, tipping, as a phenomenon, cannot be discussed satisfactorily in terms of the income levels of housing residents. Plaintiffs claim, nonetheless, that an increase in the number of low income residents would be synonymous with an increase in the number of non-white tenants and that if the Area tips, middle income non-white residents will also flee. (Tr. 263-264, 301-303, 2526-2530). Plaintiffs' expert witness Roger Starr testified that tipping in the Area has nothing to do with the extent of the racial prejudice of its residents because they expected that the Area would contain a mixture of races and that they would not have moved in were they prejudiced. Rather, he contended, the Area will tip if the number of low income units exceeds 2,500 because these residents relied upon alleged representations of that figure as the maximum number of such units and because if this understanding is violated, their "subjective reactions" will cause them to flee. (Tr. 300–307)

This concept of tipping as a function of the gross numbers of low income residents must be rejected because, unlike the racial characteristics of a neighborhood, which are easily measurable, any definition of low income is imprecise and depends upon an arbitrary income ceiling, the family size, and the cost of living, none of which remains constant. If one adopts as the income criterion the eligibility limits of public housing, then the characterization of low income persons ranges from $6,100 maximum income for a family of one to $10,200 maximum income for a family of seven. If, however, one adopts the eligibility limits for Section 236 housing, which are 135% of the public housing limits, and which plaintiffs must necessarily adopt since they include Section 236 units within their calculation of total low income units within the Area, then the corresponding maximum income limits range from $8,235 to $13,770. And if one adopts the Section 236 exception limits, then the maximum income ranges from $9,250 for a family of one to $17,200 for a family of seven or more. Thus a family may be categorized as low income according to one set of criteria but as middle income according to another, and either categorization will vary as children are born into a family or reach majority or otherwise terminate dependency.[25]

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[25] To illustrate: Dr. Frank Kristoff, plaintiffs' expert witness, testified that he defined a household of three as low income if it had an income of up to about $6,800, and of four as low income up to about $7,800. (Tr. 2534).

Regardless of the fact that the 2,500 policy was never intended as a fixed maximum, reliance upon a fixed number of low income residents to measure tipping is unfounded when the definition of low income is itself subject to arbitrary and varying criteria.

More important, despite their protestations to the contrary, implicit in plaintiffs' argument is the belief that low income persons have a greater propensity to induce neighborhood deterioration than their middle income counterparts. This idea, however, was rejected in Nucleus of Chicago Homeowners v. Lynn, 372 F. Supp. 147 (N.D.Ill.1973). Moreover, two of plaintiffs' expert witnesses, Roger Starr and Dr. Frank Kristoff stated that aside from welfare and single parent families, one cannot associate a propensity toward anti-social behavior with low income families. (Tr. 231, 2547). In the absence of almost overwhelming proof of such a broad proposition, we too must reject it.

Even assuming *arguendo*, however, that tipping could be correlated with an increase in the low income population of a neighborhood, the questions are still raised as to what criteria should be considered in determining if the tipping point has been, or is likely to be, reached, and what standard of proof plaintiffs must meet in order to succeed. While community attitudes towards an increasing presence of low income families must of necessity influence the stability of that community and are therefore relevant to a tipping analysis, the gross numbers themselves should be considered only to the extent that they are of a measurable group. Moreover, what is crucial is not the number *per se* (except insofar as they affect community attitudes) but rather the ability of the community from the standpoint of its services and facilities to absorb and serve the needs of the particular group in question.

We conclude for the purposes of this litigation that the tipping point of a community is that point at which a set of conditions has been created that will lead to the rapid flight of an existing majority class under circumstances of instability which result in the deterioration of the neighborhood environment. The criteria to determine whether an area has reached or is approaching this point are: (1) the gross numbers of minority group families or families in a measurable economic or social group which are likely to affect adversely Area conditions; (2) the quality of community services and facilities; and (3) the attitudes of majority group residents who might be persuaded by their subjective reactions to the first and second criteria to leave the Area.

Pursuant to the standard adopted in *Otero*, plaintiffs must roduce "convincing evidence" that, given the conditions of the Area, construction of public housing on Site 30 would cause the Area to tip. Although the rationale behind this stringent standard was not clearly developed in *Otero*, in Pride v. Community School Board, 488 F.2d 321 (2d Cir. 1973), the Court stated that *Otero* had adopted a stricter standard because it involved an outright denial of new public housing based upon racial classifications. In *Pride*, which involved the assignment of children because of their race to a school away from their neighborhood, the Court implied that a less stringent "rational basis" test would be applied where racial classifications are used for a benevolent purpose:

> Cases applying that [stricter] standard invariably involve state action having a segregatory or discriminatory effect. No court has applied the test where state action has had the effect and objective of reducing discrimination and segregation. 488 F.2d at 326–327.

See Note, The Benign Housing Quota: A Legitimate Weapon to Fight White Flight and Resulting Segregated Communities, 42 Fordham L.Rev. 891 (1974). See also Norwalk CORE v. Norwalk Redev. Agency, 395 F.2d 920 (2d Cir. 1968). Here, as in *Otero*, the proposed racial and economic classifications, while intended to preserve the Area, would clearly result in a denial of public housing, given the Citywide need for such housing and the scarcity of alternative sites within the City. Accordingly, plaintiffs, who are in substantially the same position as the Housing Authority in *Otero*, must meet a stringent burden of proof on the issue of tipping.

We now consider the three "tipping" criteria referred to in the second paragraph immediately preceding this one.

B. The Community Involved

With respect to the first criterion, the community involved must be measured against some standard or norm, and the community involved must be disproportionate to the norm both in terms of the percentage concentration of minorities and the trend toward concentration. Defendants contend that the applicable norm is the entire City of New York. While comparative trends within the City as a whole or Manhattan in particular are significant, we find the critical norm or "relevant community" to be the West Side Community or Community Planning District 7, which extends from 59th Street north to 110th Street and from the Hudson River west to Central Park West. See *Otero*, 484 F.2d at 1129, n. 8. This is essentially consistent with the testimony of Mr. Walter Fried (the present Vice Chairman of the New York City Housing Authority) who stated that the zone to be considered extends from 106th Street to the Lincoln Center Area. (Tr. 695).

The population trend for New York City as a whole has been an outward migration of whites and an increase in black and Puerto Rican persons as set forth in the following table presented at trial by Dr. Frank Kristoff, an expert witness called to the stand by plaintiffs. (Tr. 2630-2631).

New York City Population Profile

Year	*White*	*Black*	*Puerto Rican*
1950	90%	8%	2%
1960	81%	13%	6%
1968	75%	17%	8%

If a particular community had statistics showing both that the outward migration of whites was not occurring and that the percentage of whites was greater than District 7, Manhattan or New York City as a whole, then that would be some indication that a particular community is not in danger of tipping (Tr. 2636). For the year 1970, the following census profiles were presented. (Tr. 3486–3487):

	White	*Black*	*Puerto Rican*
New York City	67.7%	22%	10.3%
Manhattan	60%	28%	12%
District 7	73%	17%	10%
West Side Urban Renewal Area	76%	15%	9.5%

Also as to District 7, there has been a general decrease in population of all racial mixtures from about 254,000 in 1960 to 212,000 in 1970 (Tr. 2639). Thus, District 7 is not experiencing the trend of a percentage decrease in whites which is the continuing trend for New York City (Tr. 2631), and the percentage of minorities for District 7 and the Area is less than New York City and Manhattan.

With respect to single parent families with children under 18, poverty, and median income, the following sttistics were made a part of the trial record:

Single Parent Families with Minor Children
(Tr. 3487–3488)

New York City	4.8%
Manhattan	5.6%
District 7	9.7%
West Side Urban Renewal Area	3.0%

Poverty Families
(Tr. 3488-3489)

New York City	11%
Manhattan	13%
District 7	8.7%
West Side Urban Renewal Area	7.6%

Median Income
(Tr. 3489)

New York City	$9,700
Manhattan	$9,000
District 7	$11,250
West Side Urban Renewal Area	$12,700

These statistics strongly point to the inherent economic stability of the West Side area.

Dr. Frank Kristoff testified that the above statistics showing the economic and social strength of a neighborhood are major factors in considering its stability. (Tr. 2659, 3494). According to Dr. Kristoff, the West Side community was, and continues to be, strong and stable (Tr. 2653-2654) and among the upper 25% of communities within New York City (Tr. 2669). There is nothing statistically showing that the West Side community is currently tipping or in danger thereof.

Only two items of statistical evidence were submitted by plaintiffs relating to the economic and racial stability of the Area: their calculation of the number of low income units existing in the Area, and statistics submitted by Mr. Fried which allegedly show a declining white population in certain public housing projects. As to the former, plaintiffs contend that there are currently 3,300 low income families in the Area, including 517 units on three perimeter sites, 274 squatter families and the full occupancy of Leader House, Columbus Manor, and Westwood House consisting of a total of 601 units.

We find plaintiffs' calculation to be substantially inaccurate. First, it has been established that the squatter families are not permanent residents and will be removed as the buildings which they occupy become ready for demolition. Second, insofar as we are measuring the extent of fulfillment—or overfulfillment—of the 2,500 commitment, perimeter projects should not be included in the calculation. This is consistent with our finding that perimeter projects were intended to provide housing to dislocated Area residents for whom housing was unavailable in the Area proper. Finally, plaintiffs' assertion that Leader House, Columbus Manor and Westwood House are 100% low income is not supported by sufficient evidence.[26] We have serious doubts as to whether Section 236 housing should be included in a low income category. Accepting, however, defendants' admission that up to 50% of the total units at these sites is occupied by low income families (Tr. 3315–3316, 3322 and 3356), the maximum number of low income units within the Area proper is 2,046. This consists of 795 units in four public housing projects, 853 units scattered among new middle income buildings and 276 units within rehabilitated buildings for a total of 1,924 units as well as the units occupied by welfare families at Leader House, Columbus Manor and Westwood House over and above the 30% allocated to low income families by the Plan itself, or 122 units. This includes 399 units of public housing at Stephen Wise House which according to State Commissioner Goodwin should not be considered low income because of their high income eligibility limits. (Tr. 3795).

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[26] This assertion is not supported by the testimony of plaintiffs' witnesses which is inconsistent on that point. Arthur Bromberg, vice-president of Sulzberger-Rolfe, managers of Columbus Manor and Westwood House, testified that these buildings were 60% low income (Tr. 1429–1432). William Gaynor, however, former State Commissioner of Housing and Community Renewal, testified that he had been informed by Mr. Bromberg that 80% of the two projects were low income. (Tr. 2813–2814).

The Fried statistics (Ex. 29) show that among five Area and perimeter public housing projects there has been from the time of their initial occupancy (1965 for the four Area projects, 1969 for the perimeter project) to December 31, 1972, a decrease in the white population from 52.4% to 46.1% and an increase in black and Puerto Rican occupancy from 15.6% and 31.3% to 19.5% and 33.6% respectively.[27] However, when these figures are compared to the above census figures for New York City, they show that the racial trends in those projects has been less severe than the general trend for the City. Indeed, the Fried statistics show that the percentage of black and Puerto Rican occupancy in both rehabilitated and leased public housing has decreased somewhat since initial occupancy.

Plaintiffs contend, however, that the Kristoff figures are irrelevant since they do not deal with racial and economic trends between 1970 and 1974 during which time plaintiffs claim the danger of tipping is in issue. However, the burden of proof is plaintiffs' and, in terms of statistical evidence, plaintiffs have shown nothing to rebut the conclusion that the Area is both racially and economically sound.

Plaintiffs also claim that the economic decline of the Area is shown by the lack of private investment and a decrease in property values. However, both Mr. Fried and Austin Haldenstein, a real estate broker specializing in the upper West Side, testified that the lack of private investment may be attributed to generally unfavorable economic conditions, including high mortgage rates and minimal tax benefits to potential purchasers of cooperatives. (Tr. 584–585, 750, 2331–2332).

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[27] Mr. Fried also testified that there had been a change in the character of public housing tenants; that the number of mother-headed households and those without an employable member was increasing. (Tr. 892). This was not verified at trial.

Moreover, the fact that several conventional apartment houses, now under construction in the West Side, will rent at straight, unsubsidized Mitchell-Lama rates of approximately $100 to $120 per room suggests that plaintiffs' conclusions regarding private investment are unsupported. (Tr. 794–797, 2656–2660, 3787).

Mr. Haldenstein testified that beginning in 1970 there was a sharp decline in the number of brownstone sales and a decline of some 10–20% in the resale value of renovated brownstones. (Tr. 2169–2170). However, the figures which he provided at the Court's direction (Tr. 2168–69) show a substantial increase in resale prices over the cost of initial purchase.[28] Moreover, the number of resales for the period between 1969 and 1973 (five) was greater than from the inception of the Plan to 1969 (four). This shows that thus far there has not been any exodus of middle income residents as plaintiffs claim will occur if public housing is constructed on Site 30. On the contrary, the selling prices listed for the sixteen transactions including resales in the years 1970 through 1973 can only mean that individuals or families of substantial means replaced those who sold. In addition, none of the brownstone owners who testified had any unoccupied rental units and none of the units are occupied by low income families. Finally, Mr. Bromberg testified that all Mitchell-Lamas in the Area (managed by Sulzberger-Rolfe) were fully occupied. (Tr. 1626).

C. Community Services

Plaintiffs have made their strongest showing with respect to the second criterion, the quality of community services such as schools, sanitation and police control. Eight Area residents testified on behalf of plaintiffs as to numerous incidents and conditions suggestive of deterioration of the Area. Without going into the details of these includents or conditions, the testimony may be categorized into the following general areas: (a) Extensive criminal deportment: "pushing" drugs, muggings, murder, assaults, burglary; (b) Graffiti inside halls and stairs and on the exterior of buildings; (c) Loitering; (d) Excessive noise at late hours; (e) Public drinking; (f) Breaking glass, throwing rocks, bottles and firecrackers, breaking windows; (g) Garbage strewn about the streets, accumulated in buildings and tossed out of windows; (h) Verbal assaults and obscenities; (i) Starting fires; (j) Acts of vandalism; (k) Drug addiction; (*l*) Fear of the neighborhood; (m) Increasing tension between low and middle income residents with particular emphasis on the squatters; (n) Stripping of cars and illegal car repairs on the street; and (*o*) A compelling necessity to hire private street guards.

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[28] For example, one brownstone purchased in 1966 for $32,000 was resold in 1971 after renovation for $127,500. Another brownstone purchased in 1967 for $80,000 was resold in 1971 after minor work for $100,000. While much of the increase in price must be attributed to inflation and increasing value as a result of renovation, there is nothing to support plaintiffs' claim of declining property values. See Mr. Haldenstein's letter to the Court dated May 22, 1974.

In addition to the convincing testimony by Area residents on these reprehensible conditions, the managing agents and superintendents of Leader House, Columbus Manor and Westwood House offered similar testimony and added proof of the generally deteriorating condition of their respective buildings. One of the witnesses, Raphael Sifonte, states that he recently left his job as superintendent of Leader House because he would not expose his children to the drug situation there. In addition, Edward Sulzberger and Authur Bromberg, president and vice-president respectively, of Sulzberger-Rolfe which manages nine (9) properties in the Area (including Columbus Manor and Westwood House), and Jay Olnek of Hampton Management Co., which manages Leader House, testified that the conditions aforementioned in and about their buildings present serious management problems and that it is increasingly difficult to attract middle income families to the Area. (Tr. 1440–44, 1457–60, 2058–63).

We simply cannot overemphasize that the description of these revolting incidents and conditions was most disheartening. Defendants concede that the City sanctioned the presence of the squatters and the tenanting of Leader House, Columbus Manor and Westwood House with low income and welfare families in excess of the allocated 30½; they maintain, however, that they did this in order to meet the needs of low income relocatees consistent with the maintenance of a balanced economic and ethnic mix (Tr. 3169). While these needs must be met, the City has a concomitant obligation to assure that in the process the right of other residents to a safe community free of such revolting and disgusting anti-social acts and conditions is not thereby threatened. The rights of relocatees of all economic strata must be dealt with fairly but the right of the community to continued safety and stability is of no less importance.

If we had determined that the aforementioned acts and conditions were symptomatic of a consistent pattern or general trend within the Area we would be constrained to conclude that it is in fact tipping. However, from the entire trial record it is clear that the offense behavior in its most serious form, as summarized above, is localized within the three controversial Mitchell-Lamas. As to those buildings, there was a suggestion of substantial improvement. Frank J. Garcia, the superintendent of Columbus Manor, whose testimony we found persuasive, stated that since 1972 the situation has improved by 40% (Tr. 1679–1680). As to the eight Area residents who testified on behalf of plaintiffs, there was a marked concentration of witnesses from a small portion of the Area. Four of the eight reside in brownstones on 88th Street. A fifth until recently was a brownstone resident on 87th Street (technically not an Area resident). All five are active members of CONTINUE; their participation might have made them and their families inexcusably a hostile target for squatters and Area residents who seek additional low income housing (Tr. 1914-16). The remaining three witnesses were plaintiff-intervenors Karlen and Hudgins, brownstone owners on 94th Street, and a resident of St. Martins Towers on 90th Street, whose testimony, while sincere in its expression of concern for the future of the Area, lacked factual impression.

To rebut these witnesses, defendants produced eight residents, all except possibly one in the middle income category; they testified the Area is safe and free of any noticeable degree of anti-social behavior and that they do not foresee alarming conditions following the construction of public housing on Sites 4 and 30. These witnesses were owners of three brownstones on 88th, 91st and 94th Streets, residents of Leader House and St. Martins Towers and three other middle income apartment dwellers within the Area.

In addition we heard from Captain Peter Prezioso of the 24th Police Precinct, which includes the Area; he testified that crime figures in both the misdemeanor and felony categories have shown a marked decrease from 1971 through 1973 except for murder, rape, and felonious assault which he regards not "preventable crimes" (Tr. 3632a-3635; Ex. AJ). He gave testimony about various crime prevention programs instituted by the 24th Precinct over the past few years to improve the quality of police protection, including an anti-crime unit of 24 men in civilian clothes who patrol the area, block watchers and volunteer auxiliary policemen. (Tr. 3636-3646). Finally, Captain Prezioso stated that squatters have caused the police only one problem and that of minor significance. (Tr. 3648-3649).

Plaintiffs have adduced little effective testimony regarding the condition of the Area's schools, which together with the incidence of crime make up the most important criteria of the quality of community services generally. Several Area residents testified that they would not send their children to the Area's public schools because of their poor quality and minority racial concentration. We note however that this attitude is common to many middle and upper income residents throughout the City. In addition William Gaynor, former State Commissioner of Housing, testified from his observations of P.S. 84, an elementary school, and Joan of Arc Junior High School they were overcrowded and that there was a concentration of non-white children and a discipline problem (Tr. 2741). An Area resident whose children attend P.S. 84 also testified regarding an extensive discipline problem at that School (Tr. 2605-2606).

In contrast, several teachers and administrators from Area schools, including P.S. 84, testified that though there was indeed a low income and minority racial concentration to a high degree (Tr. 3388, 3442, 3580), their analysis of the schools was positive and hopeful. The principal of P.S. 84 testified that that school has been cited as outstanding in its educational programs and that vandalism and exceptional disciplinary problems are rare. This analysis was supported by the testimony of a teacher coordinator at P.S. 84 who stated that the students come from a varied economic background and that many middle income families seek to enroll their children there. (Tr. 3264-3267). As to Joan of Arc Junior High School, which defendants concede has serious educational deficiencies, Mrs. Hannah Hess, former president of the Parents Association of P.S. 84 and current head of the Joan of Arc Mini School, testified that while there has been a decrease in violence at the High School, a great deal of hostility remains (Tr. 3274). At the Mini School, which contains 68 students randomly selected from the student body and reflecting a similar ethnic and economic breakdown, there has occurred through its personalized educational process a marked increase in the students' reading scores (Tr. 3574). The Mini School may expand to 120 students next year. Finally, Mrs. Elaine Schwartz, who directs a teacher training program at Fordham University and in that capacity has extensive contact with schools in the West

Side Area generally, including Area schools, stated that while she would not send her children to Joan of Arc,

> The hard work that's been put into the public school systems that began with decentralization has really helped the elementary schools a great deal and it is working up slowly, we hope, to the junior high schools. (Tr. 3422).

We find that while there has been substantial testimony of numerous deplorable anti-social acts within the Area, the totality thereof does not depict a general deteriorating condition. Further, we are not convinced that the Area's community services, primarily its schools and police control, would be unable to absorb 160 public housing families on Site 30. Accordingly, from that standpoint the Area is not in danger of tipping.

D. Community Attitudes

The third criterion is the attitude of Area residents to the prospect of additional low income units in the Area and in particular to the construction of public housing on Site 30. Plaintiffs contend that given the condition of the Area as they portray it, failure to adhere to the original alleged limit of 2,500 low income units and construction of public housing on Site 30 would cause massive flight on the part of middle income residents. Two brownstone owners testified that they have sold their brownstones because they felt the Plan was not being fulfilled and that the Area was deteriorating. (Tr. 1855–1856, 3014–3015). A third is awaiting the outcome of this litigation to see if the City will complete the Plan as he conceives it was originally promised. (Tr. 2383–2384). All residents called to the stand by plaintiffs stated that the Area was no longer safe and that they believed the City had abandoned both the Plan and the Area as originally conceived. In addition, plaintiffs' expert Roger Starr testified that a maximum of 2,500 low income units was adopted as a principle of the Plan, that tipping was directly related to this convenant and that it would occur if the 2,500 maximum were exceeded because it was relied upon by middle income families as a "crucial element in the Plan" (Tr. 303–304; 311–314). He maintained that the fear of crime in the Area is rare for a community in which there has been such a vast investment of public and private funds (Tr. 257).

As has been shown, not only is plaintiffs' reliance upon the 2,500 commitment unfounded, but more important, there is neither an excessive minority nor a low income concentration in the Area and the quality of its community services has not been proven inadequate. Accordingly, while we do not question the sincerity of plaintiffs' expresions of fear and concern, they have failed to establish it by substantial proof. There is, for example, testimony by other middle income residents that they do not fear for the safety of the Area or its future.

The assertion that a community might tip because of the unsupported fears of its residents demonstrates the inherent weakness of that tipping concept. In large measure, the tipping point is a subjective and prejudicial reaction of whites to minority group encroachment and to that extent is subject to a wide range of subjective factors. As one commentator has put it:

> If differing individual white tolerances for black neighbors and jittery white expectations are tipping's primary causes, then tipping points will vary according to the attitudinal composition of a given white population and the differing arrangements of environmental factors which would trigger uncontrolled white fears that an irrevocable chain of turnover has begun.

Ackerman, "Integration for Subsidized Housing," *supra* at 255. Moreover, fears held by people may have no connection to underlying facts (Tr. 2852). Accordingly, where, in light of the lack of alternative decent low income housing, a tipping analysis may mean an outright denial of housing to persons on the basis of suspect racial or economic classifications, such analysis must focus particularly upon objective and measurable criteria; community attitudes should then be considered only to the extent that they are supported by such criteria.

Mr. Roger Starr's assertion of an arbitrary tipping point of 2,500 units based upon community reliance on that figure does not go far enough. Not only is the term "low income person" undefinable with sufficient precision for the purpose of a tipping analysis, but Mr. Staff acknowledged that he did not know whether existing community services and facilities were adequate to support 2,500 units of low income housing (Tr. 372-373). Evidently Mr. Starr did not consider these objective criteria in his analysis, for he admitted that if the Plan called for 1,000 units or 5,000 units of low income housing, those figures might be the tipping point. (Tr. 300-305).

Plaintiffs assert that one of the causes of tipping is the lack of effective screening and eviction procedures to root out problem-prone families or persons who have committed acts of vandalism and crime. (Tr. 330, 779-786). Mr. Starr testified that he would favor construction of public housing on Site 30 and that it would not cause tipping if effective screening and eviction procedures were available (Tr. 345-349, 352).

However, both Mr. Joseph Christian, Chairman of the New York Housing Authority, and Mr. Fried testified that recent court decisions dealing with the Housing Authority's screening and eviction procedures have limited its access to records as a means of verification and that the Authority must rely primarily on personal interviews with prospective tenants (Tr. 781-786, 3811-3812). In addition, judicially imposed sanctions extending due process rights to the eviction process have made that process heavily time-consuming.[29] Nevertheless, Mr. Christian stated that the limitations have not "stymied our efforts at getting out undesirable families" and that the Authority has implemented its screening and eviction procedures to the fullest extent authorized by law. (Tr. 3812).

What is important here is not only the effectiveness of those procedures but rather the fact that the record is devoid of any showing that the procedures were ever resorted to by plaintiffs as a means of ridding the Area of problem-prone families. We are constrained to conclude that while the record is replete with testimony by plaintiffs' witnesses of anti-social behavior on the part of squatters and residents of Leader House, Columbus Manor and Westwood House, little if any effort was ever made to locate and evict the offenders. Indeed, while numerous residents from 88th Street complained of the squatters' offensive and, in many cases, unlawful behavior, they did not pursue the matter. Captain Prezioso for instance could recall only one incident involving the squatters that was ever reported to his precinct. While we find no fault with plaintiffs' motives in this litigation and approve many steps they initiated to solidify their position, we must point out that they have failed to exhaust the available administrative remedies, time-consuming through they may be, as a possible means of preserving the Area and freeing it of truly undesirable persons. The authorities must count on effective citizen assistance and participation.

We cannot subscribe to what we regard as an untenable position advanced by plaintiffs: they have associated the undesirable behavior of individuals with a broad economic class and claim that the expanding presence of that class is undesirable and a cause of tipping. We declare no meaningful proof exists in the trial record that the presence of that class is *per se* a cause of neighborhood deterioration. We reject it.

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[29] See e. g., Escalera v. New York City Housing Authority, 425 F.2d 853 (2d Cir.), cert. denied, 400 U.S. 853, 91 S.Ct. 54, 27 L.Ed. 2d 91 (1970); Tyson v. New York City Housing Authority, 369 F.Supp. 513 (S.D. N.Y. 1974); Lopez v. Phipps Plaza South, Inc., 498 F.2d 937 (2d Cir. 1974).

We conclude therefore that plaintiffs have not shown convincing evidence that the Area is in danger of tipping or that construction of public housing on Site 30 would cause tipping.

To complete this point, we should note that numerous Federal, State and City officials also testified that the Area would not tip with the inclusion of additional low income housing beyond 2,500 units. Both Commissioner Goodwin and Mr. Christian (Chairman of the New York City Housing Authority) so testified. The fact that the State has assumed responsibility for completion of the Plan is extremely significant, for it reflects the opinion of the State Department of Housing and Community Renewal as to the hope and promise that condition of the Area afford. Commissioner Goodwin is convinced that the State's commitment for the Area was based upon its conclusion that the Area was a stable neighborhood and a desirable target for the commitment of State funds; that the State would not commit its funds to an area of the City which was in danger of tipping. (Tr. 3786–3789). She went further: even if there were between 3,500 and 4,000 low income families, that would not cause the Area to tip (Tr. 3798–3802).

In addition, contemporaneous with its NEPA study, HUD prepared a Project Selection Criteria Study which analysed many of the factors central to a tipping analysis and on the basis of that study approved construction of public housing on Site 30. While we do not adopt the HUD study as a substitute for our tipping analysis inasmuch as the study did not consider what we regard as imperative factors, such as community stability, its relevant portions are consistent with our own analysis and lend further support to the conclusion that the Area will not tip. We believe it would be helpful to enlarge somewhat upon the HUD Criteria Study.

E. HUD Criteria Study

When federal funds are to be expended for low income housing projects, then, pursuant to 24 C.F.R., Part 200, Subpart N, HUD must make a site selection criteria study. The purpose of this study is to assure that low income housing is needed, that the project will be accessible to community facilities and services, that the project will not unduly overburden existing community facilities and services, and that the project will not adversely affect the environment. The site selection criteria study measures eight separate standards which are to be rated superior, adequate, or poor. A poor rating on any standard results in automatic disapproval of the project. For our purposes, the relevant standards and a brief analysis of the facts supporting HUD's respective conclusions are:

1. *Need for Minority Housing Opportunity:* Within a one-mile radius of the proposed project, there is a population of 206,508 of which 72.8% are white and 23.6% are Negro. Because the new housing project will be made available to those people within the Area relocating from substandard housing, there will be no increase within the community in the ratio of the proportion between minority and non-minority persons.

2. *Need for Improved Locations for Lower Income Families:* The proposed location of the new low income housing project is satisfactory because there are sufficient community facilities and services and such facilities and services will not be overburdened as the result of the project. Recreational and cultural facilities are available, public schools are generally newer and less crowded than in other areas of the City, religious houses of workship are near, the streets serving the project are minor, twenty additional parking spaces will

be made available, subway service is nearby, four fire and four police stations are nearby, five hospitals close at hand, and a full variety of shops and restaurants exist. Therefore, the geographical location of the project is satisfactory.

3. *Relationship of the Project to the Growth and Development of the Community:* Because the low income housing project is an integral part of the West Side Urban Renewal Plan, it satisfactorily relates to the proposed growth and development of the Area.

William Green, Regional Administrator of HUD, testified effectively and convincingly that the first and second standards received adequate ratings because the proposed project was in an already integrated area where there is other federally assisted housing, and that purpose of these standards is to avoid concentrating minority and subsidized housing in any one section of a metropolitan area (Tr. 3290–3294). The third standard was given a superior rating. Mr. Green did not consider this standard to be relevant to a tipping analysis. On the other hand, plaintiffs contend that one of the major causes of tipping in this situation is that the proposed project is inconsistent with the Plan upon which they relied. Accordingly, the third standard is relevant to the extent that it rebuts the basis for plaintiffs' alleged reliance.

F. The Pocket Ghetto Question

Plaintiffs also contend that construction of Site 30 as public housing would cause an 80% concentration of low income units on 91st Street between Amsterdam Avenue and Central Park West creating a "pocket ghetto" within the meaning of *Otero*. In *Otero*, the Housing Authority argued that adherence to its first priority regulation would result in a racial composition in the Seward Park Extension buildings of 80% non-white and 20% white, and that since this would act as a tipping factor within the community, the Authority was obligated to prevent the formation of such non-white pockets rather than to limit itself to the overall current community racial proportions. 484 F.2d at 1133. The Court accepted in principle the concept of a pocket ghetto and stated that to prove the validity of its claim, the Housing Authority must show that the "segregative effect of compliance with [its regulation] would be impermissible or, more specifically, that it would create a pocket ghetto of the type that would lead to a substantial increase in the overall non-white population in the community, precipitating a trend toward ultimate ghettoization of the entire community." 484 F.2d at 1135.

Plaintiffs, who are in substantially the same position as the Housing Authority was in *Otero*, have not met their burden of proof. Whereas in *Otero* the claim was that a pocket ghetto would be created in the buildings which were the subject of action, here, in contrast, plaintiffs have arbitrarily assumed that the critical area is a two block section of 91st Street. While this is not an unreasonable assumption, in view of the fact that Site 30 borders on both 90th and 91st Streets and along Columbus Avenue, it certainly would be no less reasonable to define the critical area as 90th and 91st Streets from Amsterdam to Columbus Avenues. According to this definition, if this were the critical area then the percentage of low income units would be just over 50%, or 751 out of a total of 1481 units. (Ex. S). Alternatively, one could reasonably expand the critical area to Central Park West with the resulting percentage of low income units being 49%, or 1,055 out of a total of 2,117 units. (Ex. S). Plaintiffs have not shown that their delineation of the critical area in which the alleged pocket ghetto be created is the correct one. In the absence of such a showing we find no reason to accept it as the basis with which to assess the validity of their claim. Moreover, their asserted percentages are subject to question. Plaintiffs include in their 80% calculation 399 units of public housing at Stephen Wise Towers (Site 29) which is adjacent to Site 30. Yet Commissioner Goodwin testified that on the basis of the high income eligibility limits at that project, she does not consider it to be low income housing. Again, as with the broader tipping analysis, plaintiffs have failed to define the generic term upon which they base their claims.

Even were we to accept plaintiffs' delineation of the critical area and their 80% calculation, they have not demonstrated that construction of public housing on Site 30 would in any way precipitate a trend toward the ultimate ghettoization of the Area, required by *Otero* whereby plaintiffs were obliged to demonstrate with convincing evidence that the alleged pocket ghetto on 91st Street would lead to the tipping of the Area. This they failed to do.

VI. HUD's COMPLIANCE WITH NEPA

Plaintiffs contend that non-compliance with the National Environmental Policy Act of 1969 ("NEPA") makes illegal the federal decision to fund public housing at Site 30. Two arguments are made with respect to this issue: (A) the decision is illegal because no evironmental impact statement was prepared as part of the decision making process, and (B) the decision is illegal because the environmental review that was conducted by HUD was inadequate as a matter of law. We have concluded, for the reasons set forth below, that plaintiffs are incorrect with respect to both arguments and that defendants must prevail on this issue as well.

A. The Environmental Impact Statement

Plaintiffs argue, in substance, that NEPA requires the filing of an environmental impact statement in this kind of a situation; that HUD's decision not to file such a statement was arbitrary and erroneous, and that therefore HUD's decision to fund Site 30 for public housing was illegal. We have concluded that HUD did not need to file an impact statement; our reasoning is prefaced by a discussion of NEPA and HUD's own regulations with regard to impact statements.

Briefly stated, NEPA makes environmental protection part of the mandate of every federal agency; it requires federal agencies to make a factual study of the effect of a proposed project so that the agencies will be able to ascertain whether the benefits of the proposed action will outweigh the detrimental factors. Based upon such analysis, the agencies may then make an informed decision as to whether to proceed with a project. The statute requires an environmental impact statement only for "major" federal actions which "significantly" affect the quality of the human environment. 42 U.S.C. § 4332(2)(C).[30] This general legislative lan-

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[30] 42 U.S.C.A. Sec. 4332 provides:

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall—

* * * * *

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

(i) the environmental impact of the proposed action.

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented.

(iii) alternatives to the proposed action.

(iv) the relationship between local short term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to deguage was developed in the guidelines published by the Council on Environmental Quality ("CEQ").[31] Section 3 of these guidelines directed federal agencies to promulgate their own procedures for "identifying those agency actions requiring environmental statements . . ." Council on Environmental Quality, Guidelines § 3, 36 Fed. Reg. 7724 (1971).[32]

These CEQ guidelines are merely advisory, because the CEQ does not have the authority to prescribe regulations governing compliance with NEPA. Greene County Planniing Board v. Federal Power Commission, 455 F.2d 412 (2d Cir. 1972). Following these CEQ guidelines, however, HUD published Circular 1390.1[33] setting forth the detailed procedures that it would employ for screening all HUD projects to insure its compliance with the Act as to each project.

HUD Circular 1390.1 estabilshed certain "thresholds" that are used to isolate those projects that may be major federal actions significantly affecting the quality of the human environment. A project passing the first threshold is then given special environmental consideration and study. This means that the project must be thoroughly investigated and the HUD office involved

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velop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of Title 5, and shall accompany the proposal through the existing agency review processes.

[31] The Council on Environmental Quality is the agency established by Title II of NEPA. 42 U.S.C. §§ 4341-4347, to serve as a research, resource, and advisory body in the Executive Office of the President of the United States.

[32] See also Council on Environmental Quality, Preparation of Environmental Impact Statements, Proposed Guidelines, 38 Fed. Reg. 10856-10866 (1973).

[33] HUD initially promulgated draft procedures, 37 Fed.Reg. 22673 (1972) which became incorporated in its final regulations, effective July 1, 1973.

must either file a "negative statement" indicating that approval of the project application is consistent with established HUD policy and standards and that the project would have no significant adverse effect on the environment or, if unresolved environmental issues or concerns remain, the HUD office must draft and circulate a detailed environmental impact statement.

These regulations established the rule that proposed apartment projects of one hundred or more units (including Site 30 with its 160 units) require a "Special Environmental Clearance." Additionally, paragraph 3 of HUD Circular 1390.1, Appendix A, states that issues raised by opponents and supporters of HUD projects shall be given careful consideration.[34] See Hiram Clarke Civic Club, Inc. v. Lynn, 476 F.2d 421, 423-424 (5th Cir. 1973).

The precise question before us, then, is whether the negative statement or Special Environmental Clearance prepared by HUD, which concluded that the public housing project on Site 30 would not have a significant adverse impact on the environment, complied with the mandate of NEPA and with HUD's own guidelines.

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[34] Paragraph 3 states:

Special Environmental Clearance" for projects and major changes: That additional review of environmental consequences which shall be applied to larger size projects with greater environmental significance (including all projects above thresholds in Appendix A) and to projects which are *controversial* with regard to whether or not HUD and other appropriate environmental policies and standards are being met, or *precedent-making* in the sense that important environmental circumstances are not treated in HUD's central office guidance documents. For this purpose, the HUD Environmental Clearance Worksheet see (Appendix B) is suggested. All special environmental clearances shall result in either (a) a *negative statement* signed by the head of the HUD field office . . . indicating that approval of the application is consistent with established HUD policy and standards and would have not significant adverse effect on the environment, or (b) if there are still unresolved environmental issues and concerns, the drafting and circulating of a *102(2)(C) environmental statement.* A negative statement or a 102(2)(C) environmental statement shall become part of the application file and shall accompany the application through the HUD review and decision process. (emphasis in the original).

The appropriate standard for reviewing HUD's threshold determination that an environmental impact statement was not reqired here is whether that decision was "arbitrary" or "capricious" under § 10(e) of the Administrative Procedure Act 5 U.S.C. § 706. Hanly v. Kleindienst, 471 F.2d 823 (2d Cir. 1972).[35] See also Calvert Cliffs' Coordinating Committee v. A. E. C., 146 U.S. App. D.C. 33, 449 F.2d 1109, 1115 (1971); Transcontinental Gas Pipe Line Corp. v. Hackensack Meadowlands Development Comm., 464 .2d 1358, 1365 (3rd Cir. 1972); Conservation Council of North Carolina v. Froehlke, 340 F.Supp. 222, 225 (M.D.N.C. 1972), Citizens for Reid State Park v. Laird, 336 F.Supp. 783 (D.Mo. 1972).

In applying this standard to HUD's determination that the proposed public housing project would not signficantly affect the environment, we must first define the term "significantly" as it is used in § 102(2)(C) and then determine what are the appropriate environmental criteria that muste considered in a NEPA study. As to the first task, the Second Circuit has interpreted the amorphous term as follows:

> "In the absence of any Congressional or administrative interpretation of the term, we are persuaded that in deciding whether a major federal action will 'significantly' affect the quality of the human environment the agency in charge, although vested with broad discretion, should normally be required to review the proposed action in the light

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[35] Hanly v. Kleindienst, *supra*, involved a NEPA study of the proposed construction of a jail as part of the Court House Annex being built in the Foley Square neighborhood. The case was remanded twice by the Court of Appeals, first as Hanly v. Mitchell, 460 F.2d 640 (2d Cir. 1972) (hereafter "Hanly I") and then as titled above (hereafter "Hanly II").

> of at least two relevant factors: (1) the extent to which the action will cause adverse environmental effects in excess of those created by existing uses in the area affected by it, and (2) the absolute quantitative adverse environmental effects of the action itself, including the cumulative harm that results from its contribution to existing adverse conditions or uses in the affected area." Hanly v. Kleindiest, 471 F.2d at 830-831.

As to the range of environmental criteria that must be considered, plaintiffs contend that psychological and social as well as physical factors must be included, also that HUD was required to analyze issues such as neighborhood stability and community attitudes and fears. Specifically, plaintiffs claim that HUD should have determined whether the proposed project would cause the Area to "tip." Defendants respond that a NEPA study does not require an analysis of psychological and social factors and that although HUD's study does not specifically mention the word "tipping," it did consider those measurable factors which bear upon the projects' social impact, including the percentage of minority residents and the quality of community services and facilities, and on that basis HUD concluded that the project would not cause tipping. Finally, defendants contend that issues such as the propensity of low income persons to commit anti-social acts and community fear of the presence or influx of low income persons are not measurable factors and therefore not part of a tipping or social impact analysis.

The concept of tipping as defined in *Otero* is a racial population change in a community over a short period of time. Plaintiffs claim that a study of tipping necessarily involves an analysis of psychological and sociological factors relating to the attitudes and fears of community residents. There was considerable testimony by plaintiffs' witnesses, both expert and Area residents, that there is a rapidly growing fear in the Area of increasing crime and ghettoization, and that these attitudes are attributable to the increasing number of low income families, particularly the squatters.

The issue is two-fold: (1) Whether NEPA requires consideration of thost tangible factors such as the incidence of crime and the quality of schools which are the basis for social attitudes of residents; and (2) whether such attitudes must also be weighed independently of the tangible factors upon which they may be based.

The law is clear that the requisite environmental analysis includes physical, social, cultural and aesthetic dimensions. *Hanly I*, 460 F.2d 640 (2d Cir. 1972), a leading case in interpreting NEPA in this Circuit, states positively:

> "The National Environmental Policy Act contains no exhaustive list of so-called 'environmental considerations,' but without question its aims extend beyond sewage and garbage and even beyond water and air pollution. See Ely v. Velde, 451 F.2d 1130 (4th Cir. 1971); Goose Hollow Foothills League v. Romney, 334 F.Supp. 877 (D. Or. 1971). The Act must be construed to include protection of the quality of life for city residents. Noise, traffic, overburdened mass transportation systems, crime, congestion and even availability of drugs all affect the urban 'environment' and are surely results of the 'profound influences of high-density urbanization [and] industrial expansion.' Section 101(a) of the Act, 42 U.S.C. § 4331(a)." *Hanly I* at 647.

Thus issues such as percentage of minority residents or proximity of public housing projects and the quality of community services such as the degree of crime, police protection, schools, hospitals, fire protection, recreation, transportation and commercial establishments are essential to a NEPA study.

Plaintiffs argue, however, that increasing the number of low income families will "tip" the Area because they will cause a rise in the incidence of crime and anti-social behavior in the Area such that middle income residents out of fear for the safety and stability of the Area will flee. Accordingly, they argue, the NEPA study of the environmental impact of public housing on Site 30 should have included an analysis of its effect upon the incidence of crime and its impact upon the attitudes of the community.

We find, however, that community attitudes and fears, or the propensity of certain economic or racial groups to commit anti-social behavior, do not lend themselves to the same type of objective analysis and are not required in a NEPA study. In *Hanly II, supra,* plaintiffs contested the failure to consider the psychological and sociological effects upon the residents of the Foley Square neighborhood brought about by the construction of a jail within the new Court House Annex. Though the Court did not expressly decide the issue, it nevertheless observed:

> For the most part [plaintiffs'] opposition is based upon a psychological distaste for having a jail located so close to residential apartments, which is understandable enough. It is doubtful whether psychological and sociological effects upon neighbors constitute the type of factors that may be considered in making such a determination since they do not lend themselves to measurement. *Hanly II* at 833.
>
> Unlike factors such as noise, which can be related to decibels and units which measure duration, or crime, in which crime statistics are available, psychological factors are not readily translatable into concrete measuring rods. *Hanly II* at 833 n.10

Similarly, in Nucleus of Chicago Homeowners Association v. Lynn, 372 F. Supp. 147 (D.Ill.1973), plaintiffs sought to enjoin the construction of a low income housing project on the ground that HUD, in its NEPA study, failed to consider the effect of the social characteristics of low income people upon the neighborhood. The complaint was dismissed after trial. Plaintiffs asserted that low income people "possess a higher propensity toward criminal behavior and acts of physical violence, a disregard for the physical and aesthetic maintenance of real and personal property, and a lower commitment to hard work." *Supra* at 149. The court found that measuring human behavior and analyzing its consequences on the environment "is an especially difficult, if not impossible, task," relying upon *Hanly II*, *supra*, and Cross v. Harris, 135 U.S. App. D.C. 259, 418 F.2d 1095 1107 (1969). As to whether the social characteristics of public housing tenants constitute an environmental consideration within the scope of NEPA, the Court took the position that:

> "Environmental impact in the meaning of the Act cannot be reasonably construed to include a class of persons per se. The provisions of the Act concern actions which harm or affect the environment. Therefore, the social and economic characteristics of the potential occupants of public housing as such are not decisive in determining whether an impact statement is required under the Act. The relevant consideration is whether acts or actions resulting from the social and economic characteristics will affect the environment." 372 F. Supp at 149.

Plaintiffs' expert witnesses have testified similarly that aside from welfare families and those headed by a single parent, low income families could not be associated with a propensity for social problems. (Tr. 231, 2547). Another expert called for the purpose of assessing the adequacy ofhe HUD study stated that though fears may contribute to neighborhood instability, they may be irrelevant to actual facts. (Tr. 2852).

Accordingly, neither the alleged antisocial propensities of low income persons nor the fears which their increasing presence may engender are objective criteria of community stability and as such do not fall within the ambit of a NEPA study. We conclude therefore that determination by HUD that the conversion of Site 30 to public housing would not "significantly" affect the environment was not arbitrary or capricious. Further, we reiterate our finding that no convincing proof on this point exists in the record before us; certainly to engage in inferences instead would be both unwarranted and dangerous.

B. The Special Environmental Clearance

Plaintiffs argue, alternatively, that HUD's environmental study, the Special Environmental Clearance (Ex. E), was inadequate as a matter of law. Among plaintiffs' criticisms are that the study failed to consider community opposition to the project; that it ignored a large number of the proposed project's environmental consequences; that HUD did not conduct an independent analysis of environmental issues, and that the study failed to consider alternatives to the proposed project. We find, however, that the study is satisfactory in all these respects.

HUD's study (Ex. E) must be sustained if its findings that construction of 160 units of public housing on Site 30 were based upon adequate coverage of the requisite criteria defined above and are supported by the facts adduced at trial. The burden rests upon plaintiffs to raise substantial environmental issues and to establish that HUD's findings are based upon inadequate evidentiary development. Only to that extent do we consider evidence on the environmental impact of the proposed project in order to determine the reasonableness of HUD's findings. Hiram Clarke Civic Club, Inc. v. Lynn, supra, 476 F.2d at 425. See also Save Our Ten Acres v. Kreger, 472 F.2d 463 (5th Cir. 1973).

The study is made up of several parts. The first part is a one-page statement of the ultimate conclusion that the proposed project will not have a "significant adverse impact on the environment." The statement also points out that there was a "considerable organized opposition to the project . . . motivated by alleged social impacts . . . [but such] impacts are not environmental impacts within the context of Section 101 (b) of NEPA."

Plaintiffs contend that HUD failed to consider community opposition to the proposed project or to provide an opportunity for the community to express its views regarding the environmental review. While there is no statutory provision on the subject, the law is now clear that, consistent with the obligation to "affirmatively develop a reviewable environmental record . . . even for purposes of a threshold section 102(2)(C) determination," *Hanly I, supra,* 460 F.2d at 647, before a threshold determination of significance is made "the responsible agency must give notice to the public of the proposed major federal action and an opportunity to submit relevant facts which might bear upon the agency's threshold decision." *Hanly II,* 471 F.2d at 836. Moreover, Section 5(a)(3) of HUD's own regulations provides that "issues raised by opponents . . . of the HUD actions shall be carefully examined to determine whether the project involves significant environmental impacts."

HUD has complied with that obligation. The NEPA study includes several letters from officers of CONTINUE setting forth in detail its opposition to the project and Mr. John Maylott, director of the New York City area office of HUD at the time (the study was completed in April, 1972) testified that on numerous occasions he met with opponents of the project to ascertain their views (Tr. 3092–93). Thus, plaintiffs had ample opportunity to make known their views and submit facts relevant to the determination.

The second part of HUD's NEPA study consists of a four-page Special Environmental Clearance Worksheet. This section briefly addresses the five criteria set forth in Section 4332 of NEPA which must be analysed if a "detailed" environmental statement were required, as well as population density, the quality of community facilities serving the Area, and the incidence of crime. In respect to population density, the facts show that

Site 30 will contain 160 units of which at least 16 will be for the elderly, a maximum population of 576 persons and a normal maximum number of children of 356. Neither the population density nor the dwelling unit density will significantly alter or be incongruous with the immediately surrounding area. With respect to public schools, all elementary and intermediate schools are under-utilized, and the overcrowding in the high school is being alleviated by new construction. Other community facilities such as health, recreation, cultural and transportation facilities were found to be adequate; no issue of inadequacy has been raised by plaintiffs. In respect to crime, 1971 statistics placed the Area in the "high per capita" as to robberies and burglaries and "intermediate" as to auto thefts and homicide. The study concludes that there is no basis on which to conclude that the project would have an impact upon the incidence of crime in the Area.

The next portion of NEPA's study consists of a 13-page draft environmental clearance worksheet prepared by the New York City Housing Authority. (Ex. E-1). Part G of the worksheet states that Site 30 will have seventeen stories of which the ground floor will be commercial and that 32 of the units are preliminarily designated for the aged.[36] The project will be "an integral part of the area," will serve the needs of the relocatees "whose need for housing can only be met through the provision of low-rent public housing." Part H of the report, the stated purpose of which is to analyze "physical, social, and aesthetic dimensions," begins with an analysis of the housing stock describing them as in "good condition" of which "many have become cooperatives in recent years." As to the brownstone streets, "Trees and backyard gardens have been planted and many streets have regained much of their original charm." Adequate transportation is accessible. Public facilities serving the proposed site include four fire stations, four police stations, and five health facilities and hospitals. In the surrounding district there are 15 public housing developments with 5,266 units and 24 moderate income units with 10,795 units; and of a population of about 232,000, 80% are white, 12% Negro, and 8% Puerto Rican. The schools are less crowded and newer than in most areas of New York City. Private and parochial schools have greatly expanded, and such local private schools as Ethical Culture, Colombia Grammar, Franklin, Baldwin, Bentley, Trinity, Collegiate and Walden attract students from all over Manhattan. The building of the project itself will create job opportunities for minority persons. The Area has many cultural and recreational facilities, and the financial commitment to it has produced "sound housing and supporting services for residents of all income levels. . ."

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[36] Mr. Fried testified that this was inaccurate and that only 16 units were specifically designated for the elderly (Tr. 654).

In Part I, the Housing Authority concludes that it foresees no adverse influence created by the development. In Part J, the Authority concludes that there are no alternative site locations because of the scarcity of land. To shun the West Side Urban Renewal Area in favor of outlying sites "would be to relegate the inhabitants of these areas to the worst possible housing and environmental conditions with all the evils concomitant to such an existence." There are 135,000 families on the Authority's waiting list who "urgently require better housing."

The next portion of HUD's study includes data on zoning and data on air pollution, also CONTINUE's assertions and complaints. The following portion includes HUD's four-page evaluation of the application for Site 30; this evaluation includes many of the statistics reviewed above.

We find that the HUD study in its totality gave satisfactory coverage to both the environmental and social factors requisite to a NEPA analysis. While the evidentiary basis for its conclusions regarding the incidence of crime and the quality of Area schools is deficient in that it fails to develop a reviewable environmental record, the testimony adduced at trial (*supra* at Part V) demonstrates that HUD's conclusions in respect to these issues were reasonable and supported by the evidence.

Plaintiffs claim, however, that the NEPA study was inadequate because HUD did not conduct an independent analysis of environmental issues, that HUD relied on information supplied by the Housing Authority. NEPA is specifically directed to the agency with overall responsibility for a proposed federal action and that agency must make its own independent, balanced judgment of the environmental implications of the proposed action. Greene County Planning Board v. Federal Power Commission, 455 F.2d 412 (2d Cir. 1972), Calvert Cliffs Coord. Com. v. United States Atomic Energy Comm., 146 U.S. App. D.C. 33, 449 F.2d 1109 (1971). See also, Scenic Hudson Preservation Conference v. *F. P. C., 354 F.2d 608 (2d Cir. 1965), cert. den. sub nom., Consolidated Edison Co. of New York v. Scenic Hudson Preservation Conference, 384 U.S. 941, 86 S.Ct. 1462, 16 L.Ed.2d 540 (1966). The reason for this restriction is that:*

> "Certification by another agency that its own environmental standards are satisfied involves an entirely different kind of judgment. Such agencies, without overall responsibility for the particular federal action in question, attend only to one aspect of the problem: the magnitude of certain environmental costs. . . . Thus the balancing analysis remains to be done. It may be that the environmental costs, though passing prescribed standards, are nonetheless great enough to outweigh the particular economic and technical benefits involved in the planned action. The only agency in a position to make such a judgment is the agency with overall responsibility for the proposed federal action—the agency to which NEPA is specifically directed." *Calvert Cliffs, supra,* 449 F.2d at 1123.

Moreover, where the judgment relied upon is that of the applicant, i.e. the Housing Authority, there is the possibility that the applicant's statement may be based upon self-serving assumptions. See Greene County Planning Bd. v. F.P.C., *supra*, 455 F.2d at 420.

Here, however, while HUD did in fact rely upon information supplied by the Housing Authority in its application (the Draft Environmental Worksheet), HUD made an independent analysis and judgment based upon all the information available to it. Moreover, that analysis uncovered the only significant inaccuracy in the application regarding the existence of community opposition to the project, and HUD officials met independently with those opposed in order to ascertain their views. This demonstrates not only did HUD exercise independent judgment but also that it verified the quality of the information submitted. The cases upon which plaintiffs rely are inapposite for they involve situations wherein the agency charged with a NEPA study substituted the judgment of another agency. See *Calvert Cliffs, supra; Greene County, supra.* We have found no authority for the proposition that HUD may not rely upon information submitted by another agency so long as it makes its own judgment as to the environmental impact of a proposed project.

Finally, plaintiffs contend that the study was inadequate in that it failed to consider alternatives to the proposed project or its cumulative effect in the context of related government actions, and that an environmental impact statement should have been prepared relative to the whole Area. As to the last claim, we fail to see its relevance to the issue before us—whether HUD's NEPA study approving Site 30 is supported by the facts. As to consideration of alternatives, this is required only in an environmental impact statement: HUD had determined that such a statement is not necessary because the project will not significantly affect the environment. Moreover, the Housing Authority stated in its draft environmental clearance worksheet that, considering the scarcity of available sites and the unmet needs for public housing, there are no alternatives. As to consideration of related governmental actions, such as the tenancy of certain middle income buildings with low income tenants in excess of 30% as allegedly planned, the leasing of middle income designated units for welfare families and the conversion of Site 4 to public housing, HUD found that the Area was being developed according to an approved urban renewal plan, that the proposed project was consistent therewith and that from an evaluation of the Area, its raw numbers and physical condition and the quality of its community services, the building of a public housing project on Site 30 would have no adverse environmental impact. This, in our judgment, constitutes an adequate consideration of cumulative impact measured by the standard set forth in *Hanly II, supra.*

Accordingly, we conclude that plaintiffs' attacks are ineffective. Under the circumstances before us we find that HUD did not need to file an environmental impact statement and that the environmental study which it did conduct was legally sufficient.

VII. THE CITY'S APPROVAL OF THE CONVERSION OF SITES 4 AND 30

Plaintiffs have raised an additional issue in their post-trial memoranda regarding the approval by the various City agencies of the conversion of Sites 4 and 30 from middle income to public housing. They contend that such changes in land use designation under an urban renewal plan require a formal plan change which must be processed pursuant to Article 15 of the New York General Municipal Law and the National Housing Act of 1949, Section 105(a) and (d). Processing pursuant to these statutes requires certified approval by HDA, the State Commissioner of Housing and Community

Renewal, the City Planning Commission, the Board of Estimate and the Federal Government. Defendants concede that approval of the changes was effected pursuant to Section 150 of the New York State Public Housing Law rather than Article 15 of the General Municipal Law. They claim, however, that the substantive requirements of both statutes are essentially identical and that plaintiffs therefore can claim no injury or denial of a fundamental right.

This issue was not among those stipulated to at trial. Moreover, despite the testimony of numerous federal, state and city officials, plaintiffs made no inquiry as to the proper mechanics of effecting conversion of Sites 4 and 30, such that the issue might have been properly met and clarified at trial. However, inasmuch as this issue is reasonably related to those raised at trial and in the pleadings, we consider it to the extent of determining whether failure to process the changes pursuant to the General Municipal Law deprived plaintiffs of any substantive right or of procedural due process.

Because the Housing Authority has jurisdiction over public housing projects in the City, HDA requested the Authority to prepare a Plan and Project for public housing on both Sites 4 and 30 for submission to the City Planning Commission and the Board of Estimate, pursuant to Section 150 of the Public Housing Law. The Plan and Project for Site 4 (Ex. 23) was submitted to the City Planning Commission which, after a public hearing held on July 5, 1970, unanimously approved the conversion to public housing and found it consistent with the Plan. (Ex. 24). Both the Plan and Project and the Report of the City Planning Commission establish that the site change was considered within the framework of the Area and its plan. The Plan and Project states in relevant part:

> "The site [Site 4] has been designated for redevelopment as part of the West Side Urban Renewal Plan. The project will serve as a relocation re-

> source for tenants who will be displaced from other sites still to be developed within the urban renewal area." (Ex. 23, p. 1).

The Site 4 public hearing before the Board of Estimate took place on September 17, 1970. The Board's resolution (Exhibit 28) approved the City Planning Commission's Report on the Site 4 change and HDA's Site 4 Plan and Project, and authorized a conveyance of the Site 4 property to the Housing Authority for the proposed project. The Board's resolution also identified the Project as Site 4 in the Area and states that the Project will serve as a relocation resource for tenants displaced from the sites within this Area.

The same procedure was followed for the conversion of Site 30 to public housing. At the request of HDA, the Housing Authority prepared and submitted to the City Planning Commission a Plan and Project for public housing on Site 30, which is replete with references to both the Area and Plan. (Ex. 25). A public hearing was held before the City Planning Commission on June 23, 1971. Its report (Ex. 26, p. 5) approves conversion of the site to public housing and states that the change is necessary "to help achieve the goals of the West Side Urban Renewal Project." The Report discusses many of the issues raised in this litigation, i.e. squatters, allocation of low income units and relocation priorities, and states:

> "All new housing in the West Side Urban Renewal Plan, including that proposed for Site 30, was intended to provide relocation for on-site tenants displaced by the renewal activity." (Ex. 26, p. 3).

The final approval for the Site 30 change was granted by the Board of Estimate after public hearing on November 11, 1971. The Board's resolution (Exhibit 27) adopted the Commission's report and approved the change in site designation in essentially the same terms as for Site 4. It should be noted that twenty-two (22) speakers appeared at the Board's public hearing, for and against the change under consideration, including representatives of Trinity and CONTINUE as well as Messrs. Starr and Fried.

The fundamental requisite of due process is the opportunity to be heard, to be aware that a matter is pending, to make an informed choice whether to acquiesce or contest and to assert before the appropriate decisionmaking body the reasons for such choice. Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306, 336, 70 S.Ct. 652, 94 L.Ed. 865 (1950); Grannis v. Ordean, 234 U.S. 385, 394, 34 S.Ct. 779, 58 L.Ed. 1363 (1914). In light of the full hearings held with respect to the conversion of each site before both the City Planning Commission and the Board of Estimate, it cannot be said that plaintiffs did not have full and ample opportunity to express their opposition. Moreover, the reports of both the Commission and the Board establish that the conversion of both sites was considered in light of the Plan and found to be consistent with the overall development of the Area. Plaintiffs have failed to establish that consideration of the proposals under the General Municipal Law rather than the Public Housing Law would have in any way resulted in the use of different criteria, let alone a different conclusion.

As to the consent of the State Commissioner of Housing and Community Renewal, Article 15, Section 514 of the Urban Renewal Law provides in pertinent part as follows:

> "§514. Filing of proposed plans
>
> *　　　*　　　*　　　*　　　*
>
> Upon receipt of a copy of a proposed urban renewal program, or any proposed change therein, the commissioner may transmit his criticism and suggestions to the municipality or agency, as the case may be. No change in an urgan renewal program assisted by state loans, periodic subsidies or

> capital grants may be made by a municipality or agency without the approval of the commissioner."

Defendants concede that no such consent was ever obtained pursuant to that statute. However, it is clear from the testimony of the current Commissioner, Lee Goodwin, that the State has no objection to and is in full accord with the construction of public housing on Sites 4 and 30. We conclude for the purpose of this litigation, and in light of plaintiffs' failure to raise this issue until the last minute (a lapse of almost 2½ years from the commencement of the action to the conclusion of trial), that the implicit approval of the Commissioner sufficiently satisfies the substantive requirements of Section 514 to defeat plaintiffs' claim.

Margulis v. Lindsay, 31 N.Y.2d 167, 335 N.Y.S.2d 285, 286 N.E.2d 724 (1973), on which plaintiffs rely, involved the Forest Hills Public Housing Project; it is inapposite. The issue there was the necessity of a resubmission to the City Planning Commission and Board of Estimate of a new Plan and Project for public housing because of a change in the number, height and bulk of the proposed building after the project had been once approved at earlier public hearings. There is no requirement here for another public hearing, since the issues in controversy were fully explored at the hearings already held and there has been no proposed change since those hearings. Plaintiffs do not contend that the Site 30 and 4 projects have substantially changed such that a new series of public hearings is required, but rather that the initial hearings were defective. Accordingly, *Margulis* is inapplicable to this case.

As to the issue of federal approval, Section 105(a) of the National Housing Act provides that contracts for loans or capital grants by the Federal Government require that the Urban Renewal Plan be approved by the local governing body and that the approval include certain findings. As pointed out above, the changes in the Plan were clearly approved by the City's local governing body (the Board of Estimate), and the required findings. although not stated formally in the Board's resolution or in the precise language called for by the General Municipal Law, are present throughout the City Planning Commission's Report in each case, which Reports were adopted and approved in each of the Board's resolutions. Section 105(d) of the National Housing Act provides that no land for any project assisted under Title I of the National Housing Act be acquired by the local public agency (City of New York) except after public hearing on notice. Since no issue of improper land acquisition is involved in this litigation, Section 105(d) is inapplicable.

The change in designation for Site 30 was clearly processed through and approved by HUD. That approval took the form of its NEPA study (Exhibits E, E-1), Site Selection Criteria Study (Exhibit B) and, of course, ultimately, its execution of an amendment to the Annual Contributions Contract between the Federal Government and the Authority relative to funding the construction of the Site 30 project (Exhibit AD). Since construction of the Site 4 project depends on federal funding, currently not available, the various studies required prior to funding have not yet been undertaken by HUD.

This case has troubled us greatly. The goal of a racially, ethnically, and economically integrated community is sought by many, but the road to achieving it is protracted and ofttimes perilous, a course frequently encountered where objectives are laudatory. The hopes, fears and needs of different classes and races must somehow be reconciled if urban peace is to be attained. Our resolution of this litigation is, we hope, one more step towards that end.

For the reasons set forth above, therefore, we conclude that the evidence presented by plaintiffs is factually and legally insufficient to warrant the relief sought. Accordingly, with the exception of plaintiff's motion for counsel fees, which we will consider at a later time, judgment shall be entered in favor of defendants.

The foregoing shall constitute the Court's findings and conclusions of law.

APPENDIX E

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the fourteenth day of December one thousand nine hundred and seventy-eight

Present: HON. LEONARD P. MOORE
HON. WILLIAM H. MULLIGAN
HON. MURRAY I. GURFEIN
Circuit Judges,

ROLAND N. KARLEN, ALVIN C. HUDGINS and
CONTINUE, PLAINTIFFS—APPELLANTS

v.

PATRICIA ROBERTS HARRIS, SECRETARY OF THE DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, THE CITY OF NEW YORK, and STRYCKER'S BAY NEIGHBORHOOD COUNCIL, INC.
DEFENDANTS—APPELLEES

No. 78-7147

DOCKETED AS A JUDGMENT #77,0712
ON JUNE 21, 1979

Appeal from the United States District Court for the Southern District of New York

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is reversed and the action be and it hereby is remanded to said district court for further proceedings in accordance with the opinion of this court with costs to be taxed against the appellees.

A. DANIEL FUSARO, CLERK
By ARTHUR HELLER, Deputy Clerk

APPENDIX F

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the fifteenth day of March, one thousand nine hundred and seventy-nine

Present: HON. WILLIAM H. MULLIGAN
HON. LEONARD P. MOORE
HON. MURRAY I. GURFEIN
Circuit Judges.

ROLAND N. KARLEN, ALVIN C. HUDGINS
and CONTINUE, PLAINTIFFS—APELLANTS

v.

PATRICIA ROBERTS HARRIS, SECRETARY OF THE DEPARTMENT OF HOUSING and URBAN DEVELOPMENT, THE CITY OF NEW YORK, and STRYCKER'S BAY NEIGHBORHOOD COUNCIL, INC.

DEFENDANTS—APPELLES

No. 78-7147

A petition for a rehearing having been filed herein by counsel for the appellees Patricia R. Harris, et al.

Upon consideration thereof, it is Ordered that said petition be and hereby is DENIED

A. DANIEL FUSARO, Clerk

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the fifteenth day of March, one thousand nine hundred and seventy-nine.

ROLAND N. KARLEN, ALVIN C. HUDGINS and CONTINUE, PLAINTIFFS—APPELLANTS

PATRICIA ROBERT HARRIS, SECRETARY OF THE DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, THE CITY OF NEW YORK, and STRYCKER'S BAY NEIGHBORHOOD COUNCIL, INC.,

Defendants-Appellees.

No. 78-7147

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the appellees, Patricia Roberts Harris, et al., and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is Ordered that said petition be and it hereby is DENIED.

IRVING R. KAUFMAN, Chief Judge

Supreme Court, U.S.
FILED
OCT 2 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978
No.

79-184

PATRICIA R. HARRIS, SECRETARY OF HOUSING AND URBAN DEVELOPMENT,

Petitioner,

-against-

ROLAND N. KARLEN, ET AL.,

Respondents.

Brief in Opposition

PETITION DENYING CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1978

No.

PATRICIA R. HARRIS, SECRETARY OF HOUSING AND URBAN DEVELOPMENT,

Petitioner,

-against-

ROLAND N. KARLEN, ET AL.,

Respondents,

PETITION DENYING CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Demov, Morris, Levin & Shein, on behalf of Roland N. Karlen, et al., submits that the petition for the writ of certiorari be denied and that the judgment of the United States Court of Appeals for the Second Circuit in this case be affirmed.

OPINIONS BELOW

The decision of the Court of Appeals (HUD's petition, App. A, 1a-11a) is reported at 590 F.2d 39. The decision of the district court (id., App. B, 12a-48a) is reported at 445 F. Supp. 204. The earlier opinion of the Court of Appeals (id., App. C, 49a-62a) is reported at 523 F.2d 88. The earlier opinion of the district court (id., App. D, 63a-141a) is reported at 387 F. Supp. 1044.

JURISDICTION

The judgment of the Court of Appeals (HUD's petition, App. E, 142a-143a) was entered on December 14, 1978, and a petition for rehearing was denied on March 15, 1979 (id., App. F, 144a-145a). On June 5, 1979, Mr. Justice Marshall extended the time for filing a petition for a writ of certiorari to and including July 13, 1979, and on July 5, 1979, Mr. Justice Marshall further extended the time for filing a petition to and including August 3, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

When a federal agency's consideration of alternatives in its decision-making process contains insufficient data on which to base a rational decision, does a reviewing court have the right to indicate that the agency decision was arbitrary and capricious.

STATUTORY PROVISION INVOLVED

Section 102(2)(E) of the National Environmental Policy Act, 42 U.S.C. 4332(2)(E), provides:

> "The Congress authorizes and directs that, to the fullest extent possible: *** (2) all agencies of the Federal Government shall -

* * *

> (E) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources ***

STATEMENT OF THE CASE

The petitioners seek a writ of certiorari to review the determination of the United States Court of Appeals for the Second Circuit on the narrow ground that it substituted its judgment for that of the agency by concluding that the Secretary of Housing and Urban Development ("HUD") had not complied with the National Environmental Policy Act ("NEPA") when HUD determined that more low-income housing should be added to the West Side Urban Renewal Area ("WSURA"). It is argued that the Second Circuit misconstrued NEPA and that its decision conflicts with prior determinations of this Court and those of other circuits. For the purposes of analyzing this narrow issue, the Statement of the Case contained in the petition of the three district court defendants, although factually erroneous in many respects, misleading in some of their conclusions, and incomplete as a Statement of the Case, can be accepted without the necessity of a further statement in this response. It should be noted that the reviewing agency itself (HUD) is also one of the litigants in this case; consequently, its views cannot be accepted as those of a separate and independent governmental adjudicatory body.

Facts relevant to the argument will be discussed in the legal analysis to follow.

REASONS FOR DENYING THE PETITION

1. The Second Circuit's Ruling Invalidating The Agency's Decision Was Fully In Accord With Its Statutory Powers Of Review.

Petitioner's characterization of the Second Circuit's determination as invalidating "the agency's decision because it disagreed not with the procedures followed by HUD in reaching its decision but with the decision itself" is erroneous (HUD's petition, 13). The Second Circuit's decision found HUD's position to be "arbitrary, capricious [and] an abuse of discretion..." as authorized by the Administrative Procedure Act ("APA") (5 U.S.C. 706(2)(A)) Karlen v. Harris, 590 F.2d 39, 43 (2d Cir. 1978). The opinion of the Second Circuit is devoted largely to a discussion of the internal inconsistencies, contradictions, and omissions contained in the

HUD report. There is no substitution of judgment by the court for HUD's conclusions; there is only a remand to the agency for reconsideration in light of the court's opinion of the factors required by NEPA to be evaluated by HUD in light of the requirements of the West Side Urban Renewal Plan ("Plan") and the Fair Housing Act, 42 U.S.C. 3608 et. seq. (id. at 44-45).

HUD has conceded in its petition that the arbitrary and capricious doctrine of the APA governs in stating:

> "However, because NEPA contains no special provision for judicial review, the Secretary's substantive decision could be set aside only if it was 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.' 5 U.S.C. 706(2)(A)" (HUD's petition, 13).

The petition then states categorically that "the Secretary's decision was not arbitrary, capricious or an abuse of discretion" (id.) and offers in support three observations about: (1) the consequences of "delay;" (2) the shortage of decent housing in the WSURA; and (3) the proposal for low-income units to be built on Site 30 it is claimed amounts to only 2 percent of all housing units in the WSURA (id. at 13-14).

These observations ignore the basic thrust of the Second Circuit's opinion. The significant point in the instant case is that the Second Circuit is dealing only with a determination that the agency's report is "arbitrary and capricious" within the meaning of the APA and not with any fundamental interpretation of a federal statute which would merit this Court's review. In essence, petitioners do not agree with the Second Circuit's opinion that the agency's report is "arbitrary and capricious;" they have attempted to elevate this factual disagreement into a basic issue of statutory interpretation, in an attempt to create an issue which would justify this Court to take jurisdiction.

No such fundamental issue exists.

In order to comprehend fully the Second Circuit's decision, it is necessary to explain the relevant prior history of this case -- a recital petitioners omitted from their petitions.

When the proposal for the conversion of Site 30 from middle to low-income housing occurred in December, 1972, HUD prepared a Negative Impact Statement which concluded that the project had no environmental significance, requiring no environmental clearance. This finding was challenged by plaintiff, and although HUD's finding was affirmed by the district court, Trinity Episcopal School Corp. v. Romney, 387 F.Supp. 1044, 1079 (S.D.N.Y. 1974), it was subsequently reversed by the Second Circuit (Trinity Episcopal School Corp. v. Romney, 523 F.2d 88 [2d Cir. 1975]) and remanded with instructions that the agency prepare a report in compliance with NEPA since the project did have a significant environmental impact. In so holding, the Second Circuit specified the procedural requirements of NEPA to be considered:

> "We believe that HUD failed to comply with the mandate of §102 (2)(D) of the Act and that the compliance therewith is a prerequisite to any further federal actions on the Site 30 project." (*id.* at 92-93).1

The agency, nevertheless, proceeded to prepare a Special Environmental Clearance under §102(2)(C) instead of a study of alternatives under §102(2)(D) (later changed to §102(2)(E)) as mandated

---

1 42 U.S.C. §4332(2) provides as follows:

> " (2) All agencies of the Federal Government shall....(E) study, develop and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources...." (42 U.S.C. 4332 (2)(E)).

The Court of Appeal's opinion refers to Section 102 (2)(D). In August 1975, two weeks after the Court's decision, Section 102(D) was redesignated as Section 102 (2)(E) of the Act, 42 U.S.C. 4332(2)(E). *See* Act of August 9, 1975 Pub.L.No. 94-83, *89* Stat. 424.

by the Second Circuit.[2] The Special Environmental Clearance filed in April, 1977 (almost two years later), was 200 pages long, 191 pages of which were devoted to environmental factors totally irrelevant to the issues involved and about which there was no dispute. Only 9 pages were devoted to an incomplete discussion of alternatives under §102 (2)(C) (R. 67-75). However, this discussion did not comply with the Second Circuit's mandate to study alternatives when there are unresolved conflicts concerning alternative uses of available resources under §102(2)(E).[3] Even HUD concedes this in stating that "the only NEPA requirement at issue in the present case is §102(2)(E)" (HUD's petition,

---

[2] Counsel for plaintiff wrote to HUD calling its attention to the error it was making, but its warning was rebuffed by both the agency, a party to the action, and the district judge. Claimants' request for a conference or a hearing to assist in the preparation of a proper report was also refused. Trinity Episcopal School Corp. v. Harris, 445 F.Supp. 204, 219 (S.D.N.Y. 1978); R. 261-66, 588-97. References are to pages of the printed record before the Second Circuit Court of Appeals.

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[3] This report was prepared exclusively by the three defendants in this case and was based upon their effort to support their position in this litigation. This fact, although previously surmised, was later confirmed by plaintiffs as a result of the institution of proceedings under the Freedom of Information Act (R. 309-50). The proceeding to obtain this information was strongly resisted by the defendants who insisted on preparing the report in secret. Meanwhile, repeated requests by plaintiffs to be heard at a conference or a due process hearing were refused, again defying the Second Circuit's statement that "[i]f attention is paid to the Plan and its purposes, the agencies with the cooperation of the interested parties should be able to arrive at an equitable solution." Trinity Episcopal School Corp. v. Romney, supra, 523 F.2d at 95; R. 225-28, 239-42, 265-66, 290-91, 304-50, 595.

12). Over plaintiffs' objection, the district court affirmed HUD's action a second time. *Trinity Episcopal School Corp.* v. *Harris*, *supra*, 445 F.Supp. at 204.[4] Again the Second Circuit reversed:

> "[W]e reinstate the injunction against the construction of a low-income apartment on Site 30 and remand to the district court for further consideration in light of this opinion." *Karlen* v. *Harris*, 590 F.2d, *supra*, at 45 (1978).[5]

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[4] When plaintiffs' counsel pointed out on argument that HUD's report was prepared under the wrong section, the district judge violently castigated counsel for not calling the error to his attention, whereupon counsel showed the judge a copy of a letter doing exactly that (R. 225-42, 254-308, 344-46, 577-622). In its opinion, the district court nonetheless criticized counsel. 445 F.Supp. at 219; R. 225-42, 577-622.

[5] Although the title of the case on the first appeal was *Trinity Episcopal School Corp.* v. *Romney*, *supra*, 523 F.2d at 88 and *Karlen* v. *Harris*, *supra*, 590 F.2d at 39, on the second appeal, the cases are the same.

The Second Circuit did not substitute its judgment for that of the agency as petitioners incorrectly state. Rather, the court remanded the matter for compliance with the requirements of NEPA; the gravamen of its decision was that HUD was arbitrary and capricious in its analysis by failing to evaluate the elements required by NEPA, the CEQ, its own regulations,[6] and the mandate of the Second Circuit on the first appeal. This determination was made by the Second Circuit precisely within the scope of the reviewing power accorded to it by statute. The Second Circuit said:

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[6] HUD was required by its own regulations and by the Legislation as well to consider a variety of alternatives such as: alternative locations or sites; alternatives of not building; alternative designs both in use of site and in size of individual units and in number of total units; dispersal of the low-income units on more sites in the project area; alternative measures for compensating or mitigating environmental impacts; and alternatives requiring action of a significantly different nature which would provide similar benefits with different impacts such as rehabilitation of existing buildings in the WSURA as public housing projects. See e.g., 40 CFR §1500, et. seq.

> "In seeking the scope of our reviewing powers we must look to the Congressional source, the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §§4321, et seq. and the Administrative Procedure Act (APA), 5 U.S.C. §706(2)(A) (1976) which provides in part:
>
> > 'The reviewing court shall --
> >
> > * * *
> >
> > (2) hold unlawful and set aside agency action, findings, and conclusions found to be --
> >
> > (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law...." Karlen v. Harris, supra, 590 F.2d at 43.

Pursuant to these "reviewing powers," the Second Circuit analyzed the HUD report and ascertained that HUD not only had disregarded elements its own regulations required it to consider (see note 6, supra), but had also contradicted the statements contained in its own report. Karlen v. Harris, supra, 590 F.2d at 42-44. In Trinity Episcopal School Corp. v. Romney, supra, 523 F.2d at 88 (the first appeal), the Second Circuit held that HUD had failed to consider reasonable alternatives under Section 102(2)(E) (id.at 95), and suggested a variety of alternatives HUD was expected to consider in order to comply with NEPA and its own regulations (id. at 94). In Karlen v. Harris, 590 F.2d at 42, 43 and 44 (the second appeal), the Second Circuit reaffirmed its decision on the first appeal and held additionally that the mandates of its first decision had not been followed (id. at 39). Moreover, the Second Circuit found that the most important deficiency of the HUD report was its failure to interpret the facts within the framework of the Plan, the goal of which was to renew the area as an economically balanced and integrated neighborhood (id. at 41; Trinity Episcopal School Corp. v. Romney, supra, 387 F.Supp. at 1085). It was upon these elements that the Second Circuit found, within the scope of its "reviewing powers," that the agency action was arbitrary and capricious.

The reasons offered by HUD for its recommended action border on the frivolous when weighed against the significant omissions and contradictions contained in its Report as eluciated in the Second Circuit's opinion on the second appeal.

The HUD petition, 13-14, offers three factual basis for its contention that the Second Circuit substituted its judgment for that of the agency: (1) there is a shortage of decent housing for families with low-income in the WSURA; (2) adding additional low-income units to the WSURA would be de minimus; and (3) delay.

It will be established that these items, covered in the opinions of the Second Circuit on both the first and second appeals, do not justify the conclusion that the court was wrong in setting aside the agency report.

First, there is no shortage of decent housing in the WSURA. During the more than twenty years the Plan has been in planning and execution, deteriorated or deteriorating housing in the WSURA has been replaced or rehabilitated except for buildings originally slated for demolition but later occupied illegally and forceably possessed by squatters whose continued occupancy has been condoned by the petitioners. _Trinity Episcopal School Corp._ v. _Romney_, _supra_, 387 F.Supp. at 1056; R. 181-82, 257-58.

Second, the _de minimus_ argument is incorrect in that 160 units of low-income public housing for families in a high-rise building (which is now barred by the Housing and Community Development Act of 1977 unless exceptional circumstances are shown, 42 U.S.C. 1437f (c)(1))[7] can tip an area already impacted with low-income housing into a segregated ghetto. This is particularly so where there is already an overconcentration of low-income housing. (R. 237, 268, 355-57). See Otero v. New York City Housing Authority, 484 F.2d 1122, 1133-34 (2d Cir. 1973). It is within NEPA's environmental purview to consider such an increase in low-income housing and to determine the environmental impact of that increase:

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[7] "Notwithstanding any other provision of this section, after October 12, 1977, the Secretary shall prohibit high-rise elevator projects for families with children unless there is no practical alternative." 42 U.S.C. 1437f(c)(1).

> "NEPA's aims clearly extend beyond problems and effects of sewage and garbage disposal and air and water pollution to 'include protection of the quality of life for city residents.' Noise, traffic, congestion, overburdened mass transportation systems, crime, and congestion all affect the environment." McDowell v. Schlesinger, 404 F.Supp. 221, 246 (W.D.Mo. 1975). See Hanley v. Mitchell, 460 F.2d 640 (2d Cir. 1972); Silva v. Romney, 473 F.2d 287 (1st Cir. 1973).

Thus, the infusion of an additional 160 units of high-rise low-income housing for families into a site already containing 80 percent low-income housing will exacerbate a situation ripe for crime, vandalism, etc. into a serious environmental hazard (R. 182, 206, 235-36, 353-55, 359-62, 382). Such a result is scarcely *de minimus*.

Third, petitioners misconstrue the decision below in its analysis of delay as a factor in rejecting alternative proposals. The Second Circuit (emphasizing that it is dealing with a situation having a major environmental impact now and for a long time into the future) has indicated that a two year delay in arriving at a sound resolution of the situation is justified. In its report, HUD concluded that delay was the most convincing reason for not building on alternative sites even though the alternative sites were environmentally superior. The Second Circuit has held that while delay is quite properly a factor for HUD to consider in its report, it is not sufficient to override other social and environmental concerns that Congress, "in authorizing federal aid in creating HUD itself," expected all agencies to consider when complying with NEPA. Karlen v. Harris, supra, 590 F.2d at 44; R. 69.

Petitioners' reliance on Fayetteville Area Chamber of Commerce v. Volpe, 515 F.2d 1021 (4th Cir. 1975) is unsound. In Fayetteville, delay was only one of several factors the agency considered in determining that one alternative to its proposal need not be discussed by it in its report. The court concluded that the suggested alternative's "numerous disadvantages as weighed against its one advantage... coupled with a four-year delay" (emphasis added; *id*. at 1028) required no discussion in its environmental impact statement. In *Fayetteville*, delay was only one minor factor; in the instant case, delay became the linchpin in overriding other concededly superior alternatives to building low-income housing on Site 30. *Karlen* v. *Harris*, *supra*, 590 F.2d at 44.

Thus, this case involves no fundamental question justifying a review by this Court; all it involves is a factual issue of whether the Second Circuit correctly remanded the matter on the ground that HUD's actions were arbitrary, capricious, and an abuse of discretion as determined by the Second Circuit.

2. The Determination Of The Second Circuit Is Fully In Accord With The Recent Cases Decided By This Court.

In an attempt to elevate their disagreement with the conclusions contained in the Second Circuit's opinion in this case, petitioners improperly rely on some of the language used by this Court in three cases in which it reversed remands by lower courts to administrative agencies where the NEPA statute was involved, *viz*: *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978); *Kleppe* v. *Sierra Club*, 427 U.S. 390 (1976); *Aberdeen & Rockfish Railroad Company* v. *SCRAP*, 422 U.S. 289 (1975).

The quotation in HUD's petition, 11, that NEPA's "mandate to the agencies is essentially procedural," citing *Vermont Yankee*, *supra*, 435 U.S. at 558, seems to indicate that the power of the courts to review such action is "procedural" only. However, an examination of the very case quoted indicates that this Court also stated: "Administrative decisions should be set aside ... only for substantial procedural or substantive reasons as mandated by statute, Consolo v. FMC, 383 U.S. 607, 620 (1966) ... ." Vermont Yankee, supra, 435 U.S. at 558.

Indeed, in the three cited cases, this Court evaluated the lower court determinations on the merits and found them to be incorrect; it did not reverse solely on the basis that they were "substantive" determinations and hence, erroneous, as petitioners would seem to imply. In actuality, the reviewing power of the courts in NEPA cases is both procedural and substantive, but the latter only on a limited basis under the APA, i.e., the "arbitrary and capricious" standard used by the Second Circuit in this case.

This Court has upheld a court's review of the merits of an agency's determination in Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971). The pertinent part of Overton states:

> "Scrutiny of the facts does not end, however, with the determination that the Secretary has acted within the scope of his statutory authority. Section 706(2)(A) [of the APA] requires the finding that the actual choice made was not 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law ... .' To make this finding the Court must consider whether the decision made was based on a consideration of the relevant factors and whether there has been a clear error of judgment." (id. at 416).

In Overton (which is cited in Vermont Yankee, supra, 435 U.S. at 549, n.21), this Court held that the Secretary of Transportation had failed to comply with the directives of Section 4(f) of the Department of Transportation Act and Section 138 of the Federal-Aid Highway Act by not considering viable alternatives in developing a highway through a park. In its brief, HUD candidly admits that in such a situation, the court must review the substance of an agency's decision to determine whether it was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law (HUD's petition, 13). This is precisely what the Second Circuit did in this case; there is nothing in Vermont Yankee, Kleppe, or Aberdeen to the contrary. In those cases, this Court held that the lower courts had erred in the evaluation they made of the agencies' determinations and reversed. But these reversals were on the merits of the lower courts' actions and not because the decisions were "substantive" instead of "procedural" as petitioners would have us believe.

However, even if the Second Circuit's determination were to be evaulated factually, it is clear that its finding that the agency's action was arbitrary and capricious is fully justified.

HUD's principal argument for stating that its findings were not arbitrary, capricious or an abuse of discretion is that, because there is such a shortage of low-income housing in the WSURA and because it is the federal agency's responsibility to supply low-income people with adequate housing, it has properly used its discretion in determining the need for more low-income housing in the WSURA. In so stating, however, HUD ignores two very key factors which were the basis for the Second Circuit's remanding of the matter for HUD's further consideration.

The first is HUD's failure to comply with Section 102(2)(E) of NEPA as we have shown in "1" above.

The second is its failure to consider the principal intention and goal of the West Side Urban Renewal Plan as it is required to do under the 1968 Fair Housing Act which provides that "(d) The Secretary of Housing and Urban Development shall... (5)administer the programs and activities relating to housing and urban development in a manner affirmatively to further the policies of this subchapter." 42 U.S.C. 3608(d)(5).[8] This cannot be accomplished unless all viable alternatives for housing are adequately considered by HUD as enunciated in the first Circuit Court decision, Trinity Episcopal School Corp. v. Romney, supra, 523 F.2d at 88, and largely ignored by HUD in its report.

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[8] HUD cites the United States Housing Act of 1937, 42 U.S.C. 1437 et. seq.; (HUD's petition, 2-3) to show that it has a statutory duty to assist local governments in providing safe and sanitary dwellings for families with low-incomes. For this reason, HUD argues that it has complied with the mandates of NEPA (id., 13). In so doing, however, HUD has forgotten that it must also comply with the Fair Housing Act, 42 U.S.C. 3608, the purpose of which is to provide families with fair housing throughout the United States. One of the key elements of this Act is the need for HUD to consider the impact of integration in the sale, rental and financing of any dwelling. In the instant case, HUD must consider how the WSURA can best be integrated in accordance with both the Fair Housing Act and the Plan.

The goal of the Plan is "integration -- not concentration" (*Trinity Episcopal School Corp.* v. *Romney*, *supra*, 523 F.2d at 94), and its objectives are to accommodate the housing needs of residents of all income levels which will create an integrated community, balanced racially and economically. This can only be accomplished by following the pro-integration purpose of the Plan -- a purpose HUD would defeat if the change in the Plan is sanctioned by the court. In essence, HUD is required to consider the impact of proposed public housing programs on the racial and economic concentration in the WSURA in which the proposed low-income housing is to be built, an action it has failed to do. *See Otero* v. *New York City Housing Authority*, *supra*, 484 F.2d at 1133. The agency did not produce "an exhaustive report, identifying and investigating every environmental consequence, weighing every alternative, and discussing the relative advantages and disadvantages of the proposed federal action" as asserted in the HUD petition, 12. Instead, the Second Circuit's opinion documents very specifically (Karlen v. Harris, supra, 590 F.2d at 42-44) HUD's departures from the relevant statute and regulations, thus warranting its decision that the HUD Report is arbitrary and capricious and remanding the case for further consideration.

In Kleppe v. Sierra Club, supra, 427 U.S. at 390, which HUD cites for the proposition that a federal agency need only give a "hard look" to the environmental consequences of its decisions, the court is to determine whether the agency had some rational basis for reaching its substantive decision. As HUD states in its petition, when "an agency gives little or no weight at all to environmental values or when it rejects an environmentally preferable alternative for no apparent reason, its decision might be arbitrary and capricious." (HUD's petition, 15, note 16). This is exactly what HUD has done in its inadequate consideration of alternatives for low-income housing in the WSURA and it is for this very reason that the Second Circuit held that HUD did not comply with the statutory mandates. HUD concluded, for example, that there were at least two sites which were even more appropriate for the additional low-income housing units planned for Site 30. Trinity Episcopal School Corp. v. Harris, supra, 445 F.Supp. at 215-

16; R. 68-69. Yet HUD failed to explain why it chose to rubber-stamp the City's choices for low-income housing which did not, in its own view, represent the most appropriate alternative. Karlen v. Harris, supra, 590 F.2d at 44; R. 69.

HUD is not being asked to consider remote and speculative alternatives to low-income housing, but rather, it is being required to examine what constitutes a reasonable range of alternatives in the WSURA. What is reasonable depends on the nature and dimensions of the project itself. In the present case, the issue is not merely the building of low-income housing, but rather the economic, social, and ethnic integration of the WSURA as a whole. When an agency such as HUD admits that alternatives were not adequately addressed as it did in this instance

(Trinity Episcopal School Corp. v. Harris, supra, 445 F. Supp. at 215-16), it is incumbent upon the court to remand the case for further consideration.

As recently as last year this Court has reiterated that a reviewing court has the power to remand an arbitrary and capricious agency decision in saying:

> "We have made it abundantly clear before that when there is a contemporaneous explanation of the agency decision, the validity of that action must 'stand or fall on the propriety of that finding, judged, of course, by the appropriate standard of review. If that finding is not sustainable on the administrative record made, then the Comptroller's decision must be vacated and the matter remanded to him for further consideraton.' Camp v. Pitts, 411 U.S. 138, 143, 93 S.Ct. 1241, 1244, 36 L.Ed.2d 106 (1973). See also SEC v. Chenery Corp., 317 U.S. 80, 63 S.Ct. 454, 87 L.Ed. 626 (1943)." Vermont Yankee Nuclear Power v. Natural Resources Defense Council, supra, 435 U.S. at 549.

3. The Decision Of The Second Circuit Is In Accord With Decisions Of Other Circuits.

The district and circuit court cases petitioners cite to support their contention that the Second Circuit substituted its judgment for that of HUD are inapposite and, in fact, support our contention that a reviewing court can reject an agency's determination when it is arbitrary, capricious, or an abuse of discretion, e.g., Nucleus of Chicago Homeowners Association v. Lynn, 524 F.2d 225 (7th Cir. 1975); City of Des Plaines v. Metropolitan Sanitary District, 552 F.2d 736 (7th Cir. 1977); Matsumoto v. Brinegar, 568 F.2d 1289 (9th Cir. 1978); Culpeper League for Environmental Protection v. United States Nuclear Regulatory Commission, 574 F.2d 633 (D.C. Cir. 1978).

Each of these cases cited by petitioners (and indeed all other cases dealing with this subject) is governed by the standard discussed in "2" above. The reviewing power of the courts in NEPA cases is procedural, but substantive issues can be addressed in a review of procedural compliance with the APA standards. Thus, cases decided under these principles go both ways depending on the factual situation encountered. In no event, however, can it be argued that HUD's disagreement with the Second Circuit's decision constitutes a national basis for concluding that a fundamental principle of law was violated, thereby justifying this Court's assumption of jurisdiction, since here HUD is not acting in its capacity as an independent, adjudicatory agency, but rather as a party-litigant.

This principle is implicit in Nucleus where the Seventh Circuit recognized that its standard of review was substantive in that HUD would be required to file an Environmental Impact Statement ("EIS") if its decision were arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 524 F.2d at 229. On the merits, however, the court held that the agency action was not arbitrary and capricious and consequently required no remand. In the instant case, the Second Circuit held that the survey made and the conclusion reached by HUD was arbitrary and capricious. Thus, there is no inconsistency in doctrine between the two cases--only a difference in facts. It should be noted, too, that in Nucleus, the Seventh Circuit cited Trinity (the first appeal in this case) and Jones v. Lynn, 477 F.2d 885 (1st Cir. 1973), the facts of which resemble those in the instant litigation more closely than those in Nucleus. In Nucleus, NEPA was improperly sought as an aid to segregation -- in this case it is used, properly, as an enforcement tool of the nation's policies of integration.

In Jones, the First Circuit held that HUD was required to comply with NEPA with respect to an area urban renewal project by filing an EIS. Jones v. Lynn, supra, 477 F.2d at 891-92. The court considered the complexity of the urban renewal plan and stated that "preservation of the integrity of NEPA necessitates that the [agency] be required to follow the steps set forth in [§4332], even if it...seems likely that those steps will lead it to adhere to the present result." Id. at 892. See City of New York v. United States, 337 F.Supp. 150, 160 (E.D.N.Y. 1972); see also, Hanley v. Mitchell, supra, 460 F.2d at 648.

The Plan to develop the WSURA is complex, requiring that HUD consider all reasonable alternatives, including those that will fulfill the goal of integration contemplated by the Plan and the Fair Housing Act and not just those goals of the United States Housing Act on which HUD so heavily relies (HUD's petition, 13-14, 17). The First Circuit in Jones emphasized that alternatives HUD considered "irrelevant, trivial, or prohibitively expensive" had to be considered to maintain the fact-finding process mandated by NEPA. Jones v. Lynn, supra, 477 F.2d at 891-92.

In City of Des Plaines, the Seventh Circuit held once again that an agency's determination is reviewable on the merits (i.e., substantively) if its decision is arbitrary or capricious. 552 F.2d at 737. The court held that the Environmental Protection Agency ("EPA") had met the good faith requirement by fully and fairly considering the environmental consequences in its EIS. It determined that even though the EPA had failed to specify standards for bacterial and viral aeration, its EIS contained a fair statement of the problem and the solutions intended, insofar as it was possible to do so. Id. at 739.

In the instant case, however, HUD failed to meet this good faith requirement of NEPA as spelled out in a number of cases, viz: Citizens To Preserve Overton Park v. Volpe, supra, 401 U.S. at 402

(1971); Minnesota Public Interest Research Group v. Butz, 541 F.2d 1292, 1299 (8th Cir. 1976); Environmental Defense Fund v. Froehlke, 473 F.2d 346, 351 (8th Cir. 1972); Environmental Defense Fund, Inc. v. Corps of Engineers, 470 F.2d 289, 295 (8th Cir. 1972), cert. denied, 412 U.S. 931 (1973); Sierra Club v. Morton, 510 F.2d 813, 820 (5th Cir. 1975). In this case, the matter was remanded because HUD failed to demonstrate "how within the framework of the Plan its objective of economic integration can best be achieved with the minimum of adverse environmental impact." Trinity Episcopal School Corp. v. Romney, supra, 523 F.2d at 94. Thus, again, there is only a difference in facts between Des Plaines and this case; there is no difference in the legal principles upon which both cases are grounded. The same, of course, may be said about Matsumoto, Culpeper and any other properly decided case selected at random from the host of decisions on this issue.

HUD's record in the instant case is fraught with inconsistencies and omissions which the Second Circuit specified in its opinion and which amply justified its conclusion that HUD's report was arbitrary, capricious, and an abuse of discretion. HUD cannot arbitrarily consider the United States Housing Act without weighing the purpose of the Plan and the Fair Housing Act in complying with NEPA. Otherwise, NEPA would become a "paper tiger" behind which the statutory duties of HUD could be shunted. Appalachian Mountain Club v. Brinegar, 394 F.Supp. 105,113 (N.H.D.C. 1975).

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: New York, New York

Respectfully submitted,

EUGENE J. MORRIS

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